









**A COMMENTARY**  
**ON THE**  
**TENURES OF LITTLETON;**

**WRITTEN**  
**PRIOR TO THE PUBLICATION**  
**OF**  
**COKE UPON LITTLETON:**

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**EDITED FROM A COPY IN THE**  
**HARLEIAN COLLECTION OF MANUSCRIPTS,**  
**BY HENRY CARY,**  
**OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.**

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*From the parts which I have occasionally read, I have reason to think, that the  
Commentary is a very methodical and instructive Work.*

**MR. HARGRAVE'S REMARK. See page vii.**

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**LONDON:**  
**SAUNDERS AND BENNING, LAW BOOKSELLERS,**  
**(SUCCESSORS TO JOSEPH BUTTERWORTH AND SON,)**  
**43, FLEET STREET.**

**1829.**

**SAMUEL BROOKE, PATERNOSTER ROW.**

TO  
**CHARLES BUTLER, Esq.**  
AS  
A TRIBUTE  
TO  
HIS LEARNING, ABILITIES, AND VIRTUES,  
THIS WORK  
IS  
RESPECTFULLY DEDICATED,  
BY  
HIS OBEDIENT SERVANT,  
THE EDITOR.



## EDITOR'S PREFACE.

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**IT** might reasonably have been expected, that I should offer some apology for laying the present work before the public, if my own judgment solely had been concerned in deciding upon its importance and value. But no excuse, I feel confident, will be thought necessary, when I state it to have been in consequence of the great estimation in which it was held by so competent a judge as Mr. HARGRAVE, that I have been induced to call it forth from the obscurity and neglect in which it has hitherto lain. The circumstance of his having gone to the expence of causing a transcript of so large a manuscript to be made, the occasional references that are met with in his notes on Coke upon Littleton to the opinions of the Commentator, and, above all, the high terms in which he speaks of the work itself, seemed to give the Commentary such a character as would fully justify its publication.

As to the mode in which it is edited, a few words of explanation may be allowed me. My first care was to obtain an accurate copy from

the Harleian Manuscript ; I then collated the references with the reports and other works quoted, and supplied palpable omissions, where it was in my power to do so ; and lastly, I thought it advisable to compare the present Commentary with Lord Coke's, and to point out those instances in which they differ or follow the same course. Such a task required rather industry and diligence, than any great extent of legal acquirement. On those points, therefore, I trust it will be found that I have acquitted myself, as well as the many errors in the original manuscript would admit.

It will be observed, that in the first few sheets, the names of the cases cited, have been added : but the reader must not conclude, from the discontinuance of such addition, that less care in verifying the references has been used ; for, after a few sheets had been printed, it was found that the work would extend to a much greater bulk than had been originally computed ; and it appeared that the omission would be more than overbalanced by reducing the size of the book.

At the beginning of the copy made for Mr. Hargrave, which is also in the British Museum, the following remarks are in that gentleman's handwriting :

“ This book was copied for me, from No. 1621 of the Harleian Manuscript, at the British Museum. In the catalogue of these manuscripts, it is thus described :

‘ A book in fol. written by diverse hands wherein is contained a comment on the Tenures of Judge Littleton, by no means to be ascribed to

Sir Edward Coke, whose works are often therein cited. The author lived in the time of King James the First. At the beginning of the book is the name of Arthur Kinjesby.'

"The copy cost me a very considerable sum. But the copy is made in a very ill and obscure hand, and with gross inaccuracy in the spelling, particularly where the words are Latin.

"From the parts which I have occasionally read, I have reason to think, that the Commentary is a very methodical and instructive work. It appears to have been written after the publication of great part of such of Lord Coke's Reports as were published by himself. But as I have not yet observed any instance of a reference to the Coke upon Littleton, I presume that this manuscript was prior to that publication.

"FRAS. HARGRAYE,

"31st May, 1785."

"Note, on examining my account book, I find that I paid in the whole £12. 10s. 4d. for this copy.

"See Chapter of Parceners, at the beginning, where Doderidge's Chester is cited : as that book was first printed in 1630, it tends to prove this book written after the publication of the first edition of Coke upon Littleton, which was in 1629. But I observe that Doderidge is called Serjeant Doderidge, though he was a Judge several years before 1629; and perhaps the author of this Commentary might have seen a manuscript copy of Doderidge before its being printed.

"F. H."



After a more minute examination of the work than Mr. HARGRAVE seems to have bestowed upon it, but which the business of an Editor has necessarily imposed upon me, I am unable to give any more satisfactory account of the Author than he has done. Whether it is the production of one or more persons, I cannot take upon myself to decide. I am, however, strongly of opinion, that only one person was concerned in it. Indeed, the sole ground for thinking otherwise is, that on one occasion the Commentator subdivides the subject immediately before him, into different heads, and that towards the latter part of the work, whole sections of Littleton are transcribed *verbatim*, sometimes even without a word of comment—a practice which is not used in the earlier parts of it. But both these variations might easily have arisen from the writer having taken up the work at different periods, or even from mere inadvertence, in the prosecution of an undertaking which must have employed a considerable time to accomplish. On the other hand it is very probable, that had another person taken up a half-finished performance, he would either have said something by way of introduction to his share of the work, or at least have referred to passages in former pages, as illustrating his own opinions.

As to the time when this Commentary was written, whether prior or subsequent to the publication of Coke upon Littleton, it is a matter beyond question, that it was prior to that period. Lord Coke's Reports (at least the first eleven volumes) were published during the reign of

James the First; the last was published from his manuscripts, long after his death, and of course is never referred to here. With regard to Doderidge's Earl of Chester, it is next to impossible that the reference should have been made to the work subsequently to its publication; for in the first place the page is not referred to; in the next, the work, when first published in 1630, was published as the work of "Sir John Doderidge, late one of his Majesty's Judges in the King's Bench," and therefore it would not be quoted as the work of Serjeant Doderidge: and lastly, he had been too long a Judge to be mentioned as a Serjeant; for he was raised to the Bench in 1613, and was even dead before his Treatise was printed. So that on the whole, this reference would lead us to place the present Commentary several years before the death of James the First.

On this point, however, the reader may learn more from the Commentator's own Introduction, than from any arguments *ab impossibili*, and indeed quite enough to set the question at rest. In p. xiv, he refers to a work of King James's, and speaks of him as then living; and what is equally important, in the same page he gives as his reason for undertaking the Commentary, the absence and want of a comment on the Tenures of Littleton. "I have ventured," says he, "to add to this book of Littleton certain observations, which by the Judges and other learned in our law, I find in our books touching these cases of his, for explanation of them, which, though it be imper-

fectly done by me, yet peradventure it may be occasion to excite and stir up some other, *quem Musæ comitantur et artes*, to undertake this task, and far more fully and judiciously to accomplish this business." It may be worth while, for the sake of proving that this has been the work of no tyro, to draw the reader's notice to another passage in the same page, which shews that the Commentator, when he began his task, was above the age of fifty, and notwithstanding the diffidence with which he undertook it, was competent from experience to do his Author justice.

I have been unable to trace him, so as to ascertain his name, from any reference to arguments of his own, which might have led to his discovery, in reports of law arguments of the time, now extant. On one occasion he refers in a singular manner to Lambert's Perambulation of Kent, a work of which, indeed, his frequent references to it prove him to have been completely master. The passage to which I advert is as follows at p. 257 : " Lambert's Perambulation, Halling, fo. 318 in *my* book, in others, fo. 405." From this I was strongly led to suspect that the Editor of that edition of Lambert was the Commentator himself; and what is remarkable enough, found, on further research, that an edition of Lambert was published about the time when the Commentator must have lived, without date or Editor's name, the paging of which coincides with the former of these two references: but, unfortunately, our bibliographers have been unable to ascertain by whom it was edited.

Having therefore not discovered any clue which may lead us to the name of the Author, we must trust to the intrinsic merit of the Commentary itself, supported by no less a recommendation than that of Mr. Hargrave, to establish it as a standard work on the law of real property.

HENRY CARY.

*Nov. 1829.*

*5, Hare Court, Temple.*



## LITTLETON (1).

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**WE** may truly say; for the honor of our law, notwithstanding the vulgar imputation of uncertainty, that the judgment and reason of it is more certain than of any other human law in the world, as well because the grounds of our common law have from the beginning been laid with such wisdom, policy, and providence, as ~~that~~ they do provide for, and meet with, almost all cases that can possibly fall out in our commonwealth, as also because those grounds are so plain and clear, as that the professors of our law have not thought it needful to make so many glosses and interpretations, which glosses, as one doth well observe, do increase doubt and ignorance in all arts and sciences. And therefore the Civilians themselves confess that their law is a sea full of waves, the text whereof being digested into so many volumes, and so many doctors interpreting the text, and twice as many more commenting upon their interpretations, and so gloss upon gloss, and book upon book, and only doctor's opinion being a good authority, fit to be cited and vouched among them, must needs breed distraction of opinion and uncertainty in that law: the like may be said of the canon law, albeit the text thereof be scarce 400 years old. But of the professors of our law, whoever yet hath made any gloss or inter-

(1) The following remarks on Littleton are thus headed in the original Manuscript.—*Ed.*

pretation of our Mr. Littleton, though into that little book of his he hath reduced the principal grounds of the common law, with exceeding great judgment and authority, and with singular method and order; yet if he had been an author in the civil or canon law, I dare say there had been by this time so many comments and glosses made upon him, as the books written upon [that] (1) book only would have been more in number than all our volumes of the law at this day. But the learned men in our law have ever thought that Littleton, being a learned and reverend Judge, wrote with a purpose to be understood, and that therefore another man, especially if he were of less learning than he, could hardly express him better than he hath expressed himself, and therefore hath ever been read of our youngest students without any commentary or interpretation at all (2). *Sir John Davies, his preface dedicatory, fo. 4 b.* And the King (3), in his preface to his meditation upon the Lord's Prayer (4), doth remember that the Author of that book, titled "The Trial," wisheth every man to abstain from writing any book as soon as he is past fifty, which is a good caveat for myself. Nevertheless for my own private, I have adventured to add to this book of Littleton certain observations which, by the Judges and other learned in our law, I find in our books touching these cases of his, for explanation of them, which, though it be imperfectly and insufficiently done by me, yet peradventure it may be occasion "to excite and stir up some other, *quem Musæ comitantur et artes*, to undertake this

(1) In MS. *the*.—*Ed.*

(2) The whole of these pages from the beginning is taken *verbatim* from the Preface to Sir John Davies's Reports: the reference to these Reports is evidently misplaced in the MS., being put after

the next paragraph; I have given it its proper place.—*Ed.*

(3) Jac. 1.

(4) Auctor libri cui titulus est, "Examen ingeniorum," jubet post quinquagesimum ætatis annum à scriptiōe librorum abstinere.—*Ed.*

task, and far more fully [and] judiciously to accomplish this business, for I remember the saying of Dr. Bartolus, (a principal author of the Civil Laws,) that those things which are not very well invented, yet may be profitable in this respect, because they may perhaps provoke others to the investigation of the truth :” *Fulbeck’s Parallel, to the reader*, 16, [p. 2.] for it was affirmed by Coke, Chief Justice in the Common Pleas, in his epistle to the reader, before his 8th book, fo. 5 a, that our books and records yet extant for above 400 years, are but comments and expositions of our common law and acts of parliament.





## IN PLACE OF A PREFACE.

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**CAMDEN**, *fo. 574*, saith, Littleton's name was John Littleton, also Wescot, and that he was one of the Justices of the King's Bench in the time of King Edward the Fourth, to whose Treatise of Tenures the students of our Common Law are not less beholden than the Civilians to Justinian's Institutes. But thus writeth Justice Rastall, to the reader, before his *Book of Entries*, in the beginning, that his name was Thomas, and that he was a Justice in the Common Pleas in the reign of Edward the Fourth: and Coke, Chief Justice, agreeth, in his Preface to his *10th book, fo. 9*, "Littleton's Tenures is a book of sound and requisite learning, comprehending much of the marrow of the Common Law, written and published by Thomas Littleton, a grand and learned Judge of the Court of Common Pleas, sometimes of the Inner Temple, wherein he had great furtherance by Sir John Prisot, Lord Chief Justice of the Common Pleas, a famous and expert lawyer, and other the sages of the law who flourished in those days:" and he affirmeth and offereth to maintain against all opposites whatsoever, that it is a work of as absolute perfection in its kind, and as free from error as any book that he hath known to be written of any human learning; and in his Preface to his *10th book, fo. 8 b*, he saith, that Justinian's Institutes was compiled by others, though Justinian, the Emperor, did assume it to himself, as Britton, our Justinian, composed a learned book concerning the Common Law of England, and published the same in the

**5th Edw.** 1. as appeareth in 35 *H.* 6. *fo.* 4, by the commandment of King Edward 1. the tenor whereof runneth in the king's name, as it had been written by him : but in what king's reign Littleton's book was first published is not expressly mentioned; but by probable conjecture it seemeth to me, that it was not published till after the 11th year of King Henry 8, as may appear afterwards, *sect.* 514, for in them the abridgment of Fitz. [Fitzherbert] is vouched, which book was not published the 10th year of *H.* 8, as appeareth in Coke's Preface to his 10th *part*, *fo.* 10 *a.* for there, *fo.* 9 *a.*, he useth the like arguments when old *Natura Brevium* was made, and in *fo.* 10 *a.*, of another book, and *ibid.* *fo.* 10 *b.*, of the book called *The Diversity of Courts*. And moreover, in consideration of Littleton's book, thus writeth Coke also, in his 2d *part*, *fo.* 67 *a.*, *Doctør's case* ; it is " the ornament of the Common Law, the most perfect and absolute work that ever was written in any human science." And Mountayne, also Chief Justice, saith, that this book made by Littleton in this first impression, in which the new additions are omitted, is the very true register of the foundations and principles of the law. *Plowd.* 58, in *Wimbish and Tailbois' case*. And another writeth, that " Littleton hath laid a sure foundation of the laws, and by his own book hath deserved more praise than many writers of note and name by their ample volumes. And his book is of such singularity, that Littleton is not now the name of a lawyer only, but of the law itself." *Fulbeck's Direction*, 27. And in our Chronicles it appeareth, that this Littleton was dubbed knight in the 15th year of the reign of King Edward the Fourth. *Stowe*, 705 (1) : and agreeable to this is Rastall, to the reader, before the *Great Book of Entries*, thus ; the

(1) Littleton was knighted the 18th of April, 1475, as appears from *Stowe's Chronicle*, p. 429, edit. 1614.—*Ed.*

right worshipful and great learned man, Sir Thomas Littleton, Knight, sometimes one of the Justices of the Common Place, in his Book of Tenures, &c.

But some of another profession have written in depravation of Littleton and of his book, namely, Hottoman, a Civilian and Canonist, in his Commentary, *De verbis feudalibus verbo feudum*, giveth his censure, with what charity or discretion judge learned reader. *Stephanus Pasaverinus excellenti vir ingenio, inter Parisienses causidicus dicendi facultate præstans, libellum mihi Anglicanum Littletonum dedit quo feudorum Anglicanorum jura exponuntur, ita inconditè, absurdè, et inconcinne scriptum ut facile apparet verum esse quod Polidorus Virgilius in Anglicana historia scripsit, stultitiam in eo libro cum maliciâ et calumnandi studio certare. Vide Coke, 10th part, in his Preface, fo. 9 b.*

But it is not material what they say that are ignorant, *sciëntia non habet injuriam nisi ignorantem.* And I may say with my old school-mäster, *Cato Nostri non est quid quisque loquatür.* And happy were arts, if their professors would contend, and have a conscience to be in them, *sed sunt quidam fastidiosi qui, nescio quo [malo] affectu, oderunt artes antequam pernoverunt.* Coke, to his reader, before his 2d book. *Omnia, quæ nescit, dicit spernenda colonus. Fortescue de Laud. legum Angliæ, ca. 5.*

This book he hath collected out of the great volumes of the law, as an abridgment, and directed it to his son for his instruction, for the reporting of particular cases, or examples, is the most perspicuous course of teaching the right rule and reason of the law; so did Almighty God himself, when he delivered by Moses his judicial laws, [*exemplis docuit pro legibus*, as it appeareth in Exodus, Leviticus, Numbers,] and Deuteronomy. And the glosso-graphers, to illustrate the rule of the Civil Law, do often reduce the rule into a case for the more lively expressing and true application of the same. *Vide Coke Preface to*

his 8th book, fo. 4; for “ a substantial and compendious report of a case rightly adjudged, doth produce three notable effects. 1. It openeth the understanding of the reader and hearer; 2. It breaketh through difficulties; 3. It bringeth home to the [hand of the] studious, variety of pleasure and profit. I say it doth set open the window of the laws to let in that gladsome light whereby the right reason of the rule, the beauty of the law, may be clearly discerned. It breaketh the thick and hard shell whereby with pleasure and ease the sweetness of the kernel may be sensibly tasted, and adorned with variety of fruits, both pleasant and profitable, the storehouses of those by whom they were never planted nor watered.” *Coke, Preface to his 9th part, fo. 8.*

“ If the language or stile do not please thee, let the excellency and the importance of the matter delight and satisfy thee, thereby thou shalt wholly addict thyself to the admirable sweatness of knowledge and understanding. *In lectione non verba [sed veritas] est amanda, sæpe autem reperitur simplicitas veredica, et falsitas composita, quæ hominem suis erroribus allidit, et per linguæ ornamentum laqueos dulces aspergit; et doctrina in multis est, quibus deest oratio.* Certainly the fair outsides of enamelled words and sentences do sometimes so bedazzle the eye of the reader’s understanding with [their] glittering shew, as they cause him not to see or not to pierce into the inside of the matter; and he that busily hunteth after affected words, and followeth the strong scent of great swelling phrases, is many times (in winding of them in, to shew a little verbal pride) at a dead loss of the matter itself, and so *projicit ampullas et sesquipedalia verba*; to speak effectually, plainly, and shortly, it becometh the gravity of this profession; *est ipsorum legislatorum tanquam viva vox, rebus et non verbis legem imponimus*, and of these things this little taste shall suffice.” *Coke, to his reader, before his 3d book, in fine. Coke, 10th part, 101 b.*

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## ERRATA.

- Page 8, line 13, for "*lessor*," read "*lessee*."  
225, 10, for "*Westm. 2.*" read "*Westm. 1.*"  
350, 15, for "*distribueretur*," read "*diduceretur*."  
455, 1, for "*14*," read "*24*."  
542, 14, from the bottom, for "*avoidable*," read "*available*."  
612, 7, after the words "*in the right of his wife*," add, "*and  
take back an estate in fee to him and his wife*."

## LIB. I. CAP. I.—FEE SIMPLE.

### SECT. I.

**T**ENANT in fee simple is he which hath lands or tenements to hold to him and his heirs for ever. And it is called in Latin *feodum simplex*, for *feodum* is the same that inheritance is, and *simplex* is as much as to say, lawful or pure. And so *feodum simplex* signifies a lawful or pure inheritance. For if a man would purchase lands or tenements in fee simple, it behoveth him to have these words in his purchase, To have and to hold to him and to his heirs: for these words (his heirs) make the estate of inheritance. For if a man purchase lands by these words, To have and to hold to him for ever: or by these words, To have and to hold to him and his assigns for ever: in these two cases he hath but an estate for term of life, for that there lack these words (his heirs), which words only make an estate of inheritance in all feoffments and grants.

The Author, as you see, beginneth this Chapter with a definition or description what fee simple is, which though it do not consist of the *proprium genus*, and proper difference, without adding any thing else according to the rules of logic, yet it is sufficient if it doth express the nature of the thing: *ut brevem et circumscriptam quandam [juris] sententiam, quam juris-consulti, regulam, dialectici thesin, seu positionem, medici aphorismum nominant. France's Lawyer's Logic, lib. 1. c. 17. fol. 61 b.—Vide Fulbeck's Directions, fo. 24.* And though notion or etymology is the interpretation of words, and words are notes of things, and commonly of all words, either derivative, or compound, you may yield some reason fetched from the first argument, if the notation be well made, and therefore it is called *originatio, quod originem verborum explicat, et etimologia, id est, vere-loquium*, yet they are not always necessary in our law, nor of force and power to sway the law, or to bind the judges to build their judgment upon; for *sæpe-numero ubi verborum proprietates attenditur, sensus veritatis amittitur*, as

is laid in 7 Co. 27 b (1); and Egerton, Chancellor, setteth it down as a more certain rule, *in vocibus videndum, non tam à quo quam ad quid sumantur* (2), and words should be taken *sensu corrente*, for use and custom is the best exposition both of laws and words, *quem penes arbitrium est jus et norma loquendi*; see examples hereof, 4 Co. 2 a, (3) for the word "*junctura*;" *et ibid.* 14 a, (4) for the word "*sedition*;" and in 5 Co. 67, (5) for the word "*parochianus*."

It is in this place to be observed, that the author of this book, did write in the French tongue, as many of our books of law have been, which were made since the Norman Conquest. For it is usual for Conquerors to prefer their own language before the national. And immediately after the coming of the Conqueror, the Saxon language began to decline, for it is plain that the Normans at their very first entry, laboured by all means to supplant the English, and to plant their own language amongst us; and for that purpose both ordered that the laws should be ministered in the national language; as also their accounts of their revenues and all manner of pastimes, were used in the French tongue, as he that will peruse the laws of the Conqueror, and consider the terms of hawking, hunting, tennis, dice-play, and other disports, shall easily perceive. They rejected also the Saxons characters, and all that their wonted manner of writing, as writeth Ingulphus, the Abbot of Croyland (which came over with them); and as a man may yet see in the book of Domesday itself, which notwithstanding that it was written a few years after the arrival of the Conqueror, yet being penned by the Normans, it retaineth very few letters of the Saxon alphabet.—*Lambard Peramb. of Kent*, 263. *Vide Fortescue de Laud*, cap. 48, and the *Pref. ded. to Sir J. Davies R.* 3 a. So the policy of the Kings of England hath been ever since the conquest of the kingdom of Wales, (for Wales was a kingdom, 7 Co. 42, [*Calvin's case*]; and obtained by Edward 1, by conquest, as is to be seen in *Selden Tit. of Honor*, 178, and in [*Drayton's*] *Poliolbion*, 149, and *Davies R.* 49,) by all means to suppress and put in oblivion the Welsh language, and when by experience it was found that nevertheless the Welshmen did use their native tongue, at the last it was provided by parliament, that all courts of justice among them, wherein their goods, lands, and

(1) Calvin's case, p. 54.

(2) Judgment in the case of the Post-nati, p. 62.

(3) Vernon's case.

(4) Actions for slander.

(5) Jeffrey's case.

lives were to be judged, should be holden in the English tongue only, as also the administration of divine service and the celebration of the sacraments, which is the only food of our souls.—27 H. 8. cap. 26. And so all pleadings in law cases were used in the French tongue till by the statute made 36 Edw. 3. cap. 15, it was altered to the course now used, the words of which statute are, all pleas in whatsoever court shall be pleaded, shewed, and defended, answered, debated, and adjudged in English, and inrolled in Latin (1). *Nota*, 10 Co. 132 b, *et sequent* (2). And one other cause that our law books were written in French was, because King Edward 3, did first appoint that certain chosen men should be reporters of law.—*Plowd. Pref.* and *Co. Pref. to part 3. 1.*—*Fulbeck's Direction*, 3. And the world doth know what right and title he had to the kingdom of France, and that he had divers territories and provinces thereof in possession, and therefore all men endeavoured the renewing (3) of the French language; and it was not thought fit nor convenient to publish either those, or any of the statutes enacted in those days, in the vulgar tongue, least the unlearned by bare reading without the right understanding, might seek out errors, and trusting to their own conceit, might endamage themselves and sometimes fall into destruction.—*Co. to the Reader*, in his 3d book, fo. ult. and *vide Poulton*, in the latter end of his *Preface* (4).

It is also observable that Littleton in the very beginning of his book and in many other places, doth use some Latin, whereby we may understand, that our students of the common law must not be ignorant of the Roman tongue, though exquisite knowledge therein is not requisite in a common lawyer, for it is sufficient if he know so much, and in such a manner, as the common sort of men which are conversant in the reading of Latin books.—*Fulbeck's Direction*, cap. 3. 23.

All judicial records are entered and inrolled in the Latin tongue, as appeareth by the act of parliament 36 Edw. 3. cap. 15, before

(1) Hargrave in his MS. has altered the original text, and quoted the words of the statute, "all pleas which be to be pleaded in any of his courts of his justices, or in his other places, or before any of his other ministers, or in the courts and places of any other lords within the realm, shall be pleaded, shewed, and defended, answered, debated, and adjudged

in the English tongue, and that they be entered and inrolled in Latin."—*Ed.*

(2) James Osborn's case.—*Ed.*

(3) Hargrave has put *learning* for *renewing*, which is probably the better reading.—*Ed.*

(4) To his edition of the statutes is meant.—Hargrave's MS. note.

mentioned, which as unto this point is declarative of the ancient law. Of ancient time, and before the conquest, original writs, and all the processes, and the proceedings upon them were in Latin, and infinite records before that time yet extant, be entered in Latin.—*Co. Pref. to part 3. 7 a.* and *10 Co. 132 b (1)*. The works of Glanville, Bracton, and Fleta, *Novæ Directiones*, and the Book of Entries, and divers of our statute laws, are set forth in the Latin tongue.

Now is to be known the signification of this word *fee* or *feodum*, for the finding whereof we are referred to a book of the civil law, called *Summa Rosella* in the title of *feodum*.—*Paragr. 1.—Doct. & Stud. cap. 45. 145 a.* Others say that the word itself is a barbarous word. For *feodum* I am somewhat confident that its root is in *fides*, howsoever by different writing thence varied, and from it, other words *feild* which was anciently *fead*, but yet had its original, as Isodore saith, from the word *fædus*, being a good Latin word, and so it is to be interpreted *tanquam fædum*, that is, a thing covenanted between two. Others deduce it from the word *fides*, as it were in Latin *fideum*, and by a more pleasant pronunciation *feudum*, whereupon such as are feudatories to others, are called in Latin *fideles*.—*Ridley Civ. & Eccl. Law, 62, et seq.—France's Lawyer's Logic, 54 b*; and to this purpose is *Selden in his Titles of Honor, part 2. 302*.

The words of Littleton next following are, *feodum est idem quod hæreditas*, but read in *Selden Tit. of Honor, 294, Antiquissimo tempore sic erat in dominorum potestate connexum ut quando vellent, possent auferre rem in feodum a se datam, postea vero eo ventum est ut per annum tantum firmitatem haberent; deinde statutum est ut usque ad vitam fidelis produceretur; sed cum hoc jure successionis ad filios non pertineret, sic progressum est ut ad filios deveniret*: and so the book called the *Lawyer's Logic, 54 b*, that this interpretation of the word *feodum* doth not so betoken in any language.

*Et sic feodum simplex idem est quod hæreditas legitima, vel hæreditas [pura]*. But note, no man holdeth land simply free in England, but he or she that holdeth of the crown of England, all others hold their land in fee, that is upon faith or trust and some service to another lord of a manor as his superior, till it come to the prince and him that holdeth the crown.—*France's Lawyer's Logic, 54 b*.

And see Sect. 731, by the order of the common law, every estate of lands or tenements which any man or woman had which might descend to the heir, was fee simple without condition, or upon certain conditions in fact or in law. And in other books we are taught that estate in fee simple is either an estate of inheritance absolute and indeterminable, as where lands be given to one and to his heirs, he hath such a pure and absolute estate which may not determine, or fee simple determinable (1), and that in two manners (*scilicet*), either expressly derived out of an absolute and pure estate in fee simple, or implicit, and derived out of an estate tail: out of an absolute estate in fee also in two manners; 1. By condition, as upon a mortgage, and this is called fee simple conditional. 2. By limitation, as if A. do enfeoff B. in the manor of D. to have and to hold to him and his heirs so long as C. hath heirs of his body, and this is called fee simple limited and qualified, and in both these cases is the estate in the land in the feoffee, and therefore upon none of them a remainder or reversion may be expectant: implicit and derived out of an estate tail, when tenant in tail doth bargain and sell his land by deed indented and inrolled to W. and his heirs: and after doth levy a fine to him and his heirs with proclamations, he hath an estate in fee simple, so long as the tenant in tail hath heirs of his body, derived out of the estate in tail, and this is a more inferior and subordinate estate in fee simple than the other two aforesaid, for upon this a remainder or reversion may be expectant, and yet in all these cases, he that hath any such estate of inheritance may plead that he is seised of the land in his demesne as of fee, without shewing the commencement of his estate, as well when he has fee simple derived out of an estate tail, as fee simple conditional or limited.—10 Co. 97 b. *et seq. Seymour's case.*

The example upon what things this estate of inheritance may consist are lands and tenements; and by the last words in this section, namely, “feoffments and grants,” it appeareth that a fee simple may be of any thing whatsoever, corporate or incorporate (2).

(1) Lord Coke notices this threefold division of fees simple, but observes, that “the more genuine and apt division were to divide fee, that is, inheritance, into three parts, viz. simple or absolute, conditional, and qualified or base; for this word (*simple*) properly excludeth both conditions and limitations, that debeat or abridge the fee.” Co. Lit. 1 b.—Ed.

(2) So Lord Coke on these words *feoffments and grants*, says, “here is implied a division of fee, or inheritance, viz. into corporeal, as lands and tenements which lie in livery, comprehended in this word *feoffment*, and may pass by livery by deed, or without deed, which of some is called *hereditas corporata*, and incorporeal (which lie in grant, and can-

Corporate things are messuages, lands, meadows, pastures, rents, &c. which have substance in themselves and may continue for ever; incorporate things are advowsons, villainies, waifs, commons, courts, fishings, warrens, signories, and such like things as may pass by grant, and which be, or may be, appendant or appurtenant unto inheritance corporate. *Plowd.* 170, [*Hill v. Grange.*].—*Terms of Law, v. Inheritance.* And it is not impertinent to declare how many sorts of land may be demanded by law; of which the law hath a several contemplation: land therefore, as it is subject to the consideration of the law, is sixfold, *arva, florida, consita, compascua, mineralis, infrugifera*; *arva*, is the arable ground which is tilled with the plough; *florida*, the garden ground which procreateth flowers, herbs, and all such things as the bee doth feed upon; *consita*, is the woody ground which is thoroughly replenished with trees, plants, shrubs, and such like; *compascua*, is that which bringeth forth grass and fodder; *mineralis*, is that wherein mines are contained, whether they be royal mines, as mines of gold and silver, or baser mines, of brass, lead, copper, tin, coals, or the like; *infrugifera*, is that which is barren, and cannot be helped by manurance, as the soil where rushes, weeds, fern, and such things do grow (1). And it is good to know the diversity of these several sorts of ground, that when such things are to be demanded by writ, they may be demanded by their proper names and kinds &c.—*Fulbeck's Direction, cap. 8. 68.—Vide Theol.* 8. *cap. 1.*

The Latin word *terra* (2), *dicitur a terendo, quia vomere teritur*, yet *terra* doth include all.—4 *Co.* 37 b, [*Tyrringham's case*]; for land is not that only which is fixed and firm earth, but also which is immediately annexed and coherent to the earth (3), as houses, mills, &c. for the most perdurable part hereof is the land, in which the foundation is, and upon which all the fabric of them doth consist. And in respect hereof, by the grant of all my lands, all my houses, mills, and woods, do pass; for in a *præcipe*, where a house, mill, or

not pass by livery but by deed, as advowsons, commons &c. and of some is called *hereditas incorporata*, and by the delivery of the deed, the freehold, and inheritance of such inheritance, as doth lie in grant, doth pass) comprehended in this word *grant*." *Co. Lit.* 9 a.—*Ed.*

(1) Our commentator, it will be observed, notices only the different general species of land; whereas Lord Coke, 4 a,

gives us a minute list of words by which lands of different kinds will pass. It may be observed, that this sixfold division of land is taken *verbatim* from Fulbeck's *Direction*, cap. 8. 68.—*Ed.*

(2) *Terra est nomen generalissimum, et comprehendit omnes species terræ*; but properly, *terra dicitur a terendo, quia vomere teritur*. *Co. Lit.* 4 a.

(3) See *Co. Lit.* 4 a.—*Ed.*

wood is demanded, the warrant of attorney *est in placito terræ*, and in case of voucher, the judgment is *quod habeat de terris*, of the vouchee *ad valentiam*. And therefore by this he shall have houses, mills, woods, &c. and this doth agree with the civil law, *appellatione fundi omne edificium, et omnis ager continetur*.—4 Co. 87, [*Luttrell's case*.]—Bracton, lib. 2. fo. 10.—Finch, [lib. 2. b. 4.] 31 b.—Vide Bracton, lib. 2. fol. 10 a.—*Quicquid plantatur, seritur, vel inædificatur omne solo cedit, radices si tamen egit*.

But after a house is once built upon land, then in a *præcipe* it hath lost its first name of land, and must be demanded by the name of messuage, yea, though the house be afterwards utterly ruined and decayed, it must be demanded by the name of a toft, which is a name more high than lands, and more base than a messuage, and it shall bear that name for the dignity which once it had.—21 E. 4. 52 b. pl. 15.—Plowd. 170 a, [*Hill v. Grange*.]

All mines under the earth are parcel of the frank-tenement, and do pass by the grant and name of lands, whether they be covert or apert, and a fee simple thereof may be transferred either as included in the general name, or particularly by the name of mines, except such mines as contain in them gold or silver, for those be to the king by prerogative, in whose lands soever they be found, and may not be transferred from the king by general words in his letters patent, but by special words the king may grant them.—Plowd. 336, [*Case of Mines*.]

But if a man make a lease for years or for life by the name of his lands in Dale, within which is a mine, if it be close, it passeth not by the word “lands,” for if he dig and open the mine, it is waste; otherwise it is if the mine were open at the time of the lease made. 5 Co. 12, [*Saunders's case*.]

Trees also, which grow upon the face of the earth, do pass included as parcel of the freehold, and so long as the inheritance of the land and of the trees are in one person, the trees are parcel of the inheritance, and that is one reason which the common lawyers allege, wherefore tithes were not payable for great trees, even before the statute of 45 Edw. 3, of *Silva Cædua*.—Plowd. 470, [*Soly v. Molins*.] Read also the Civilian's opinion concerning this statute, Ridley, 186. [c. 4. s. 2.].—*Cosin's Apology*.—Vide Richard Liford's case, 11 Co. 46, et seq.

A lease is made of land excepting the woods, the soil itself is excepted, whereupon the trees do grow.—5 Co. 11, [*Ive's case*.] and 14 H. 8. 1.



[*(1) Home face lease per term d'ans, d'un manor reseruant boys at subbois, et fuit move, ou per tiel reservation le soil et terre, ou le bois cresca, soit reserve, et semble a Shelley nemy. Mes il voile agreer que si home graunt a moy son bois, et fait livery, le soil, ou le bois cresca passa.*—28 H. 8. 19. pl. 110, 111. Dyer.—Et vide 6 E. 6. 79 a. pl. 48. Dyer.

A man doth make a lease for years of a manor except the trees, the trees do remain parcel of the manor, and by a demise of the manor they pass, because the frank tenement doth remain entire, and the lessor doth remain tenant to every *præcipe*, and needeth no forprise.—*Vide Plowd.* 140 (2). Otherwise it is of a lease for life with such exception.—*Vide ibid.*

Lessor for life, or for years, or tenant by courtesy, or in dower, have a special interest in the timber trees growing upon the lands, for if exception be not made of them, the lessee may crop them and have the acorns, and other mast, growing upon them, and the nests of herons, shovelers, or hawks breeding in them, and shadow for his cattle (3); but if the lessee, or any other, doth sever them from the land, the property and interest of them is thereby determined, and the lessor shall have them, because they were parcel of his freehold. But the lessor or any other may not in such case enter and fell trees to the prejudice of the particular interest of the lessee. If I let lands for life, and after give the trees, and after the lessee for life dieth, in this case the donee cannot take them as it is holden, *per curiam*, 21 H. 6. 46 b. because at the time of the gift the lessee for life had the property in them, as annexed to the land.—4 Co. 63, [*Herlakenden's case.*]

Tenant for life, the remainder for life, the first tenant for life is punishable for waste during the life of the tenant in remainder for life, but if the first tenant in that case do fell trees during the life of him in remainder, the property of the trees doth remain unto him in [the remainder in] fee, or in reversion.—5 Co. 76 b, *Page's case.*

And in 4 Co. 63 (4), this diversity is taken. If I enfeoffe you of my lands, except the trees, to have and to hold to you and your

(1) This passage is so illegible in the Harleian, and so unintelligible in the Hargrave manuscript, that I have ventured to give the case in the words of the reporter.—*Ed.*

(2) The case referred to seems to be Fulnersten v. Steward, *Plowd.* 102.—*Ed.*

(3) If the lord grant the trees, it is good after the determination of the first estate, because of the general property continuing in him, but it is void to take presently: so is R. Liford's case, 11 Co. 50.—Note in MS.

(4) *Herlakenden's case.*

heirs, now the trees in property are divided from the lands, and I have them but as a chattel, though *in facto* they remain annexed to the land, for if one fell them down, and carry them away, it is no felony, as in case they had not been excepted. And therefore in this case, if I grant the trees to you, they are remitted as well in property, as *in facto*, and your heirs shall have them, and not your executor, because you had absolute ownership in both. But if a lease be made for years except the trees, and the lessor after selleth those trees to the lessee, now he hath not only an ownership in them both, and by consequence they are not re-united to the land in property, but the lessee hath one estate in the land, and another derived estate interest in the trees; and therefore if after the lessee do assign all or part of his lease, yet the woods remain to him, and so though the lease in the land do expire or determine.

A man may have a *præcipe quod reddat unam acram [terræ aquâ] coöpertam*; or a *præcipe quod reddat generally unam acram terræ*, 11 H. 7. 4a. Assise did lie at the common law of an office. *ut de libero tenemento*.—8 Co. 47, [Earl of Rutland's case.]

The words of the statute [*de prerogativâ regis*, cap. 1, are, *dominus rex habebit custodiam omnium terrarum eorum qui de ipso tenent in capite*: although this statute speaketh but of lands, yet services are to be taken by the equity of the same, as it is proved by the words *diem clausit extremum*, which saith, *quantum terræ tenet de nobis, aut de aliis tam [in] dominico quam in servicio*; so that if one hold of the king's tenant by certain services, the king shall have the services in ward, for they be in the nature and place of the land that is holden, and so shall it be supposed; and therefore when the king hath those services in ward, and the tenant, that holdeth by those services, dieth, his heir within age, if the said services be knight's service, the king shall have ward by reason of the wardship.—*Stamf. Prerog. cap. 1. 7 b.*

The words of the statute Westm. 2. cap. 1, are *de tenementis quæ multotiens dantur sub conditione, viz. cum aliquis terram suam dat alicui viro*, by these words "tenements (1) or lands," the office of steward, receiver, or bailiff of a manor may be intailed, because those offices [are] exerciseable within lands; *Manxel's case*, [Plowd.] fo. 3, and hereof, note at large in 7 Co. 123, in *Nevil's case*, where also it is adjudged that a title of honor or dignity, as to be a duke, earl, or baron, may be intailed within this statute.—*Vide Poulton, fo. 219 a.*

and uses are taken to be within the equity of this statute, though they are neither lands or tenements.—*Manxel's case*, [*Plowd.*] fo. 3. *Corbet's case*, 1 Co. 86 a.—19 H. 8. 13.

But if the custom be, that the wife shall have for her dower the moiety of the lands and tenements holden in socage, which her husband had within a certain precinct, if the husband have a bailiwick &c. or a fair in fee during the coverture, within the same precinct, the wife shall not have dower of the moiety thereof, because those things are not lands or tenements &c. and a custom shall be taken strictly. But if the husband had the bailiwick, or the fair, as appendant to a manor within the same precinct, of which manor the husband was seised in fee during the coverture, and that holden in socage; in this case, if the wife be endowed of the moiety of the manor by custom aforesaid, then she shall have the moiety of the profits of the bailiwick &c. or of the fair &c. as appendant to the moiety of the manor &c.—*Perkins*, 435, 6. Tenants by *elegit* or statute merchant, &c. who have only a term or chattel, shall have an assize, if they be evicted (by the statute in that case provided) and the writ shall be *de libero tenemento* and not *de termino*.—*Vide Dyer*, 84.

A rent is a profit issuing out of the soil of another, and savoreth of the nature of the land out of which it issueth.—See *Fulbeck's Direction*, cap. 8. 70.—*Brooke, Elegit*, 13, and the fee simple may be as well of a rent as of land; but an annuity, though it be purchased by words of fee simple, yet no estate of fee simple can be thereof.—*Bracton*, li. 4. 263 b. saith, *feodum est id quod quis tenet, ex quacunque causâ, sibi et heredibus suis, sive sit tenementum, sive redditus* [ita quod redditus], non accipiatur sub nomine ejus qui provenit ex camera alicujus. And though an annuity be granted by words of intail, yet it is no estate tail within the meaning of the statute Westm. 2. cap. 1, for a release of the grantee will extinct it. *Manxel's case*, [*Plowd.*] fo. 3. But an annuity intailed is an hereditament, and by that word "hereditament" in the 26 H. 8. cap. 13, an annuity of inheritance shall be forfeited by force of that act by attainder of treason (1).—7 Co. 124, *Nevil's case*, and many diversities there are between a rent and an annuity, whereof see 4 Co. 48, *Oguel's case*,—and in *Doct. & Stud. lib.* 1. c. 30.—19 Edw. 4. fo. 1. pl. 7.

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(1) Mr. Hargrave, in his note on that passage in Coke's Commentary which speaks of annuities, makes the same remark, and refers to the same authority.—*Ed.*

Uses are not hereditaments at the common law, as commons, rents, conditions, warranties are, 1 Co. 121 a, [*Chudleigh's case*.] But in process of time they did gain the reputation of hereditaments. 4 Co. 22, *Brown's case*; and after by the statute 27 H. 8. cap. 10, the use is transferred into the possession of the land, and the annuitant statute, made 21 Edw. 1. st. 1, and 2 H. 5. st. 2. cap. 3, by which it was enacted, that jurors shall have forty shillings *per annum* in lands and tenements, have been expounded, that if the juror be *cestui que use* of land of that yearly value, it is sufficient. 9 H. 7. 1.—15 H. 7. 13 b.

A condition is also an hereditament, and so is also a writ of error, which writ lieth in privity.—*Vide* in 3 Co. 3 b, [*Winchester's case*.]—*et* 7 Co. 13 a, in *Engle's case* (1). Tithes were inheritances at the common law, but spiritual men only had remedy for the subtraction of them, till, by the statute 32 H. 8. cap. 7, those were made temporal, which did or might come to the king by the dissolution of abbies, and *Vide* 2 Co. 44, *Bishop of Winchester's case*. *Vide Dyer*, 84 a.—*Dr. Ridley*, 178. Although the statute Westm. 2. cap. 18, doth give *elegit* by express words but in lands, by these words *medietatem terræ suæ &c.* yet all the writs of *elegit*, *ut patet* in the book of *Entries*, fo. 4, and in the *Judicial Register*, are nine precedents, all proving *quod liberet medietatem terrarum et tenementum* [*suorum*], by which it appeareth that statute doth extend as well to tenements as to lands: and in the *Book of Entries*, 137, the fourth part of a house was put in execution (2) by *elegit*; and a rent and such like may be put in execution by *elegit* as well as lands, and by this word (lands) mentioned in the statute as afore-said, in the statute *de mercatoribus*, 13 Edw. 1, a rent extinct may be extended by construction of the law, if it were in *esse* at the time of the statute or judgment acknowledged.—7 Co. 129, [*Lillingston's case*.]—*Vide Dyer*, 206 a.

By this word *tenement* (3), a reversion doth pass with attornment, if the possession may not pass.—*Plowd.* 152 a. 156 a, [*Throckmerton v. Tracy*.]—and in 34 H. 6. 8. *Prisot* and the other justices said

(1) The case referred to seems to be *Englefield's case*, 7 Co. 81.—*Ed.*

(2) This passage is so obscure in both manuscripts, as to be almost unintelligible. I have discovered that it is almost a literal translation of a passage in *Brooke* (*Elegit* 13), and have therefore been able

to restore the right reading.—*Ed.*

(3) It will be observed, on comparison, that Coke, in his *Commentary*, gives but little information on the extent of the word "tenement." See Co. Lit. 6 a. 19 b. 20, and 154.—*Ed.*

expressly, *quod reversio bene transire potest per nomen tenementi tantum*.—*Vide Perkins*, 114, and by the grant of lands and tenements, a lease for years doth pass.—*Plowd.* 424, [*Bracebridge v. Clowse*,] contrary to the opinion of *Brooke's Grants*, 155.

By the words lands and tenements advowson in gross passeth, and if it be appendant, it passeth by grant of the manor, although no mention be made particularly of the advowson, or *cum pertinentibus*. *Perkins*, 116.—5 *H.* 7. 37.—*Stamf. Prerog. c.* 15. *fo.* 43.—*et* 43 *E.* 3. 22 *a.*

A manor may pass by the word tenement.—9 *E.* 4. 6.—*Brooke's Grants*, 53, a common doth pass by these words, *tenementa, pascua, et pastura*, and a woman shall have a writ of dower *quod reddat ei rationabilem dotem de libero tenemento quod fuit &c.*, and shall make her demand of the third part of a common, therefore common of pasture is a tenement.—20 *Ass. pl.* 9.—*Fitz. Grants*, 8.—11 *H.* 6. 22 *b.*—*Vide Perkins*, 807.

The statute of the 5 *R.* 2. *cap.* 8.—15 *R.* 2. *cap.* 2, and 8 *H.* 6. *cap.* 9, made concerning forcible entries, mentioneth only lands and tenements, yet a man may have a writ of forcible entry of a rent as well as of lands, for one may distrain for rent with force, and that doth countervail an entry with force, and one may have a writ of entry of a rent, which doth suppose that the defendant did enter into the rent, and in assise of rent the disseisin may be found to be done with force.—20 *H.* 6. 11 *a.*—22 *H.* 6. 23.

But if a forcible entry, or a forcible detainer, shall be made upon a lessee for years, tenant at will, or upon a copyholder, whether it be done by a stranger or by the lessor or lord, whether the justice of peace may make restitution, and let them into their possessions again is much questioned (1), whereof read at large in the new book titled *The Justice of Peace*, *fo.* 173.

But *tenementum* doth not lie in demand, nor in plaint, for it doth not comprehend any certainty.—3 *E.* 4. 19.—11 *H.* 7. 25 *b.*—*Theol.* 127, 8. *c.* 10. 3. *Tenementum* is a general word in the law, as the word land is, and doth contain a reversion (2).—*Plowd.* 155, but a

(1) By stat. 21 Jac. 1. c. 15, the same remedy is given for forcible entry or detainer, or a term for years, copyhold, land held by *elegit*, statute-merchant, or staple, or guardian in chivalry, as on freehold.—Note in 3 Thomas's Co. Lit. 81. This

statute must surely have been in force before this commentary was written; if so the doubt of the commentator is surprising.—*Ed.*

(2) See ante, p. 11.—*Ed.*

remainder is not contained under the word *tenementum*, by Brian.—11 H. 7. 19 a. A man doth enfeof another upon condition, that after the feoffee doth purchase more land, or tenements to the value of £20 *per annum*, that from thenceforth the said feoffment to be void, and that it may be lawful for the feoffor to re-enter: the feoffee doth purchase a common of pasture to that value, this is no breach of the condition, for a common is not comprized within the words of the condition; that is to say, within the words, “lands or tenements.” *Perkins*, 807.—20 Ass. pl. 9.

But Littleton teacheth here, that if a man will purchase lands or tenements in fee simple, it behoveth to have these words in his purchase, “to have and to hold to him and his heirs,” for these words, “his heirs” only, do make an estate of inheritance, in which rule every word is to be observed as shall appear; and in 5 Co. 112 a, [*Mallory's case*,] it is said that these words “his heirs,” are of the essence of the estate, and without them no estate of inheritance can pass; and in 8 Co. 53, [*The Princes' case*,] it is said to raise an estate of inheritance, these essential words (his heirs) are necessary; and these words and many others in the law cannot be expressed by any periphrases or circumlocution (1).—4 Co. 39 b. Estates of inheritance must be framed *per verba prescripta, et in terminis terminantibus*, and are termed *verba legalia et incompatibilia*.—10 Co. 24 a, [*Case of Sutton's Hospital*,] and in these book-cases you may see many other words of like quality, viz. *vocabula artis*.—5 Co. 121 b, [*Long's case*].—Plato, lib. 11. (2), saith, let the inheritance and properties of things be definite, and certain in every commonwealth, and let a certain manner of purchasing them be prescribed by law; for a man could not certainly know what were his own, and what another man's, unless the law should, as it were, finger, point, and shew unto him what, when, and how, it were his: and therefore true is that saying of Cicero (3), *Omnia incerta sunt, cum a jure discessum est*; and his opinion is in another place, that our inheritance rather cometh to us by law (4), than by our ancestors, for

(1) Lord Coke in his commentary on this passage of Littleton, makes use of the very same words. Co. Lit. 9 a.—Ed.

(2) See Plato de Legibus, li. xi. 915 d. and as to inheritances, ibid. 912, 13.—Ed.

(3) Epist. Famil. lib. 9.—Ed.

(4) All rules of succession to estates, are creatures of the civil polity, and *juris positivi* merely. The right of property, which is gained by occupancy, extends

naturally no farther than the life of the present possessor: after which the land by the law of nature would again become common, and liable to be seized by the next occupant: but society, to prevent the mischiefs that might ensue from a doctrine so productive of contention, has established conveyances, wills, and successions, &c. 2 Bl. Com. 211.—Ed.

though they give [it] unto us, yet it is the law which doth settle it in us, and doth preserve the possession thereof, free inviolate unto us.—*Fulbeck's Direction*, c. 1. fo. 4 b. et c. 7. fo. 54 b.

And it is to good purpose, that the law should be definite in itself, and should consist of certain conclusions, which should be as the lists or periods of the science, by the contemplation of which, a man may be instructed, and sufficiently furnished for particular cases and events, for the particular case lieth, as it were, imboled, and is implicatively contained, in the general learning, for there is nothing in the law, which may not be reduced to some universal theorem, which may easily be received and remembered because it is general. *Fulbeck*, cap. 1. fo. 5. And therefore in this and certain other cases, it sufficeth not, though the meaning of the parties do appear by other words, for when the law doth set down a prescript form to be used there *forma dat esse*.—8 Co. 316, [*Arth. Blackamore's case*;] *et forma non observata infertur adnullatio actus*.—5 Co. fo. 5. [*de jure regis ecclesiastico*].—*Vide Fitz. tit. Variance*, 77.—1 Co. 104, [*Shelley's case*,] which Littleton explaineth in this section, viz. (1), "If a man purchase lands to have and to hold to him for ever," or "to him and his assigns for ever," in these cases he hath estate but for term of life, although the meaning of the parties do appear, that he should have an estate in fee, for the law must rule and over-rule the intent of the parties, and their meaning must not govern or direct the law in such cases: to this effect, see *Ass. pl. 33*, cited in 1 Co. 84 b. 85 a. b. for men's meaning ought rather to be construed by the law, than the law by the meaning of the parties, for else that were the way to bring in and maintain barbarousness, and ignorance, and a decay of all erudition, and learning, [(2) for if a man was assured that whatever words he made use of, his meaning only should be considered, he would bewery careless about the choice of his words, and it would be the source of infinite confusion, and uncertainty to explain what was his meaning].—*Plowd. 162 b*, [*Throckmerton v. Tracy*].—*Vide Dr. & Stud. li. 2. c. 20. Oportet adoptare politiam legibus, et non leges politiæ*.—20 H. 6. 35 b. where it is agreed, if lands be given to one to have and to hold to

(1) Compare Co. Lit. 8 b. et seq.—Ed.

(2) The Harleian manuscript in this passage is so obscure, that no sense can be made of it; it is however, as well as the preceding few lines, evidently taken from the case referred to in Plowden, I

have therefore thought it better to make use of the reporter's very words, which are those within the brackets: the Hargrave is perfectly legible, but equally without meaning.—Ed.

him *in feodo simplici*, he shall not have fee, nor greater estate but for life, for want of the word of inheritance (heirs); or if lands be given to a man *et primogenito filio*, if he have no sons at the time of the feoffment, the father taketh the whole, and hath estate for his life, if he have a son, then they take jointly, but for their lives, for want of the word "heirs,"—1 Co. 100, [*Shelley's case.*].—*Vide* 6 Co. 17 b, [*Wild's case.*] Also if lands be given unto two *et hæredibus*, and "*suis*" is omitted, they have estate but for life, and not fee, although there be a clause of warranty to them and their heirs, this shall not make the first words which be insensible to be of force and effect in law, although his intent doth appear, for his intent must be declared by words plain and consonant to the law.—*Ibid. ut supra.*—[*Fitz. tit.*] *Feoffment*, 8, and *Bro. Estates*, 18. But if lands be given to one man *et hæredibus*, this shall be a fee simple in him although *suis* be left out, for the intent doth appear by words of inheritance, and by sufficient certainty, and livery and seisin must be taken most strongly against the feoffor.—*Plowd.* 28, 29, [*Colthirst v. Bejushin.*] *ut res magis valeat quam pereat*, As in a deed of feoffment, the feoffor doth bind him and his heirs to warranty, but doth not shew to whom he doth warrant it, yet the feoffee and his heirs shall have advantage of the warranty, because in that case it cannot be intended that any other person should have advantage of the warranty, than he to whom the feoffment was made. *Dyer*, 42 a. and *vide* 45 a. b.—22 E. 4. 16 a. Although Littleton doth say in his maxims, that it behoveth the purchaser to have these words, "to have and to hold to him and to his heirs," whereby opinion may be that this word (heirs) doth not make estate of inheritance, unless the estate be first in the ancestor, so that this word "heirs" should only be a limitation of an estate, and not a word of purchase in the heir, yet in 20 H. 6. 35, it is agreed that where a lease is made for life, the remainder *hæredibus* W. I., that the eldest son of W. I., [(1) if W. I.] be dead at the death of tenant for life, shall have the fee simple *per hæc verba* "*hæredibus* W. I." without any more.—*Brooke, Estates*, 4.

If a man purchase land, and the words in the deed of feoffment are, *sibi et hæredi suo*, in this case nothing doth pass but the estate for life, for a man cannot have an heir during his life (2).—1 Co.

(1) These words, without which the passage would be unintelligible, have been restored from the case in the Year Book.—Ed.

(2) See Co. Lit. 86 and Mr. Hargrave's note, 45.



66 b. [*Archer's case*.]—31 H. 3. 29 b. pl. 189, also *Bracton*, lib. 2. cap. 29, saith, *hæres dicitur ab hæreditate, et non hæreditas ab hærede*, so that if there be no hereditament then there is no heir: and as nature doth beget a child, so the law doth frause an heir; and it is a rule also in the civil law, *non satis est aliquem jure sanguinis exortum esse ab ancestoribus*, &c. but it is also necessary to succeed him in right of inheritance; that the heir apparent hath no right to his father's inheritance till after his father's death.—See *Lit. s.* 446.—*Plowd.* 44, [*Wimbish v. Talbois*.] Although a man or woman may have a writ of ravishment *de guard* by these words, *Quare filium et consanguinum suum et hæredem suum rapuit et abduxit*, and in the life-time of the party, when by the law he cannot have an heir, yet it is because there is no other form of writ in the Chancery briefs.—*Fitz. N. B.* 139. But if a remainder be limited unto the heir in the singular number, upon a lease for life or years, there the heir doth take an estate for term of life by purchase.—1 Co. 104 a, [*Shelley's case*.] If John-a-Stile purchase lands, and in place of these words "*hæredibus suis*," the words are "*hæredibus* of John-a-Noakes," and if in this case John-a-Noakes, be then living, the purchase is only in John-a-Stile for his life, but if John-a-Noakes be dead at the time of the purchase, then the purchase is in the heirs of John-a-Noakes, together with John-a-Stile, viz. for their lives.—*Fitz.* 108 (1), by *Thorpe*.—27 E. 3. 87 b.

The words of Littleton in this place are, *et hæredibus*, but this copulative (2) *et* doth not make a joint estate between the purchaser and his eldest son, or heir apparent, for these words are declaratory, and only words of limitation of the estate of inheritance, which of necessity are requisite to make the purchaser to have estate in fee simple. 5 Co. 112 a, [*Mallory's case*.] *Et sic acquirit donatorius rem donatam ex causâ donationis, et hæres ejus post eum ex causâ successionis, et nihil acquirit ex donatione factâ antecessori, quia cum donatorio non est feoffatus*.—*Bracton*, lib. 2. cap. 6.—*Vide* 1 Co. 104 a. So if upon a lease for life or for years, a remainder is reserved to him and to his heirs, although the words be joint, and in the copulative, yet in the construction of law the lessor shall have it during his life and his heir after his decease. And you may see in *Plowd.* 289, *Chapman's case*, divers cases where this copulative

(1) I have been unable to discover to which of Fitzherbert's works the Commentator refers; he usually refers to the

*Natura Brevium* merely by the page, and to the Abridgment by the title.—*Ed.*

(2) See Co. Lit. 8 b.

*et* shall be taken as a disjunctive, &c. And 5 Co. 112, [*Mallory's case*].

Sometimes it happeneth that in the deed of feoffment the word *aut* is for *et*, which doth greatly alter the case, for if a feoffment be made to a man, "to have and to hold to him or unto his heirs," here he hath estate but for life, for there wanteth words precedent to direct the words in the disjunctive; and so for the same reason, if a reservation of a feoffment in fee be made unto one or his heirs, such a reservation is not good but during the life of the feoffor, but if a lessor do reserve a rent yearly during the term unto him or his heirs in the disjunctive, these be words of explanation to direct the lessee to whom he should pay the rent during the term, viz. unto the lessor during his life, and after his death unto [his] heir.—5 Co. 112 a, *ratio patet ibid.*

Upon consideration of the premises, a man may see how necessary it is that such deeds of feoffment, and other instruments, whereby lands and tenements are conveyed from one man to another, be drawn and made by men expert in the knowledge of the law, and not by imperites, which error is a principal occasion of many suits and contentions and intricate questions in the law.—Co. to the reader before his book (1).

But to proceed to some other points markable in this section, the words are "to have and to hold to him and to his heirs," whereby is shewed the manner and artificial form, how deeds and feoffments of lands and tenements are to be made, for as the premises (2) in a deed of feoffment do aptly shew who are the parties to the feoffment, and express the thing intended to be conveyed, so it is the office and nature of the *habendum* (3) to explain what estate shall pass thereby.—2 Co. 65 a, [*Buckler's case*].

But this formality is not absolutely necessary, so that the words "his heirs" be mentioned in the conveyance.—Dyer, 253.—Plowd. 158, [*Throckmerton v. Tracy*], for if the words "his heirs" be placed in the premises of your deed, although they be omitted in the *habendum*, yet the fee simple is sufficiently conveyed thereby, for it hath been resolved in *Auditor Knight's case*, that whereas the queen did grant a manor to B. and his heirs in the premises of the letters

(1) I have not been able to meet with any passage in any of the several prefaces to Coke's Reports, which can enable me to supply the omission of the figure in this reference.—Ed.

(2) See Co. Lit. 6 a.—Ed.

(3) Lord Coke says, the *habendum* hath two parts, viz. first to name againe the feoffee; and secondly to limit the re-taintic of the estate. Co. Lit. 6 a.—Ed.

patent, *habendum et tenendum* the said manor to B. and his assigns, omitting "heirs," in the *habendum*, that the fee of the manor doth pass by the premises of the letters patent, and the *habendum* is void, for the premises be sufficiently certain to pass the fee simple, 8 Co. 56 b, *Utile per in utile non vitiatur*. And concerning the construction of deeds and charters when the word subsequent in them, may seem to cross the precedent word, two rules are set down in 8 Co. 154 b, viz. *Quando carta continet generalem clausulam posteaque descendit ad verba specialia, quæ clausula generali sunt consentanea, interpretanda est carta secundum verba specialia*. The other rule is *Generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa*. Whether these prescript words "his heirs," were originally necessary for the creating of an estate in fee simple by our law, seeing it is not so in other nations, or when they were first instituted, *Quære?* And it seemeth in George Salter's book of the Ancient Laws of Great Britain, that this maxim is as ancient as any principle of the common law—*Cap. 8, writ at large*. But in Coke's preface to the reader before his 6 part, 2, are two charters mentioned, made long before the Conquest, wherein these words "[his] heirs" are not mentioned, but by general words equivalent an estate in fee simple was effectually granted, and to this effect, see *Lambert's Kent*, 406.

This is also to [be] observed, although in the beginning of this section, the words be, "tenant in fee simple is he that hath lands and tenements to hold to him and his heirs for ever," yet in the end of the same section it is thought that the words "for ever," are but abundant, and not necessary for the framing of the estate in fee simple, and yet the words "for ever" are commonly and ordinarily added to the other material words in all purchases of an estate in fee simple, which course and practice it seemeth Littleton did approve to this end and purpose, that by these words "for ever," which are familiarly known to all men, the vulgar and unlearned people, where not apprised in the laws, may apprehend the force and effect of these other words of art (his heirs). And to the effect here mentioned, see *sect. 331 & 446*.—1 Co. 104 b, [*Shelley's case*].—4 Co. 37 b, [*Tyrringham's case*].—10 Co. 34 a, [*Case of Sutton's Hospital*], it is said by the justice, that there may be clauses inserted in charters, as well of the king, as of other men, *ex consuetudine clericorum*, which be not *de necessitate legis*, but some are declaratory and explanatory, and some prolix and nugatory, *sed lex multa proficientia et proficientia paucis comprehendit*.

The words of this maxim are general, "these words, *his heirs* only do make the estate of inheritance in all feoffments and grants," which nevertheless do admit exception [in] divers cases, as after appeareth.—*Sect. 17.—Dyer, 263 a*, Baron and Femme (1), and a third person purchase lands to them and to the heirs of the husband and of the stranger, the stranger doth release unto the husband *tantum*, without words of his heirs, this shall move to the husband and his heirs, because he had fee simple in the whole lands at the time of the release made (2); and so *Lit. s. 305*. Markham, Justice, 19 *H. 6. fo. 74 b*, saith, this I take the law to be, that no man shall have inheritance by any deed or conveyance without words of inheritance contained within the same deed, but only in two cases. 1. In case of a quest in frank-marriage. 2. In frank-almoigne; and if these two cases were now to be argued or ruled by reason, I think no inheritance should be hereof made, but it is a maxim in our law, that such gift shall make an estate of inheritance, the reason whereof is not now to be urged.—*Vide Perkins, 48. [s. 236, et seq.]* But upon partition between parceners, if one of them grant a rent unto the other for equality, this shall descend unto the grantee, although the grant were not made to him and to his heirs.—*Plowd. 134 b, [Browning v. Beston.]* So if intailed lands be parted by partition between parceners, and a rent reserved unto one of them; this rent shall be in tail, and it shall be of the same condition that the land was.—2 *H. 7. 5.—Brooke, Estates, 39.*

If a man seised in fee do make a lease for life or for years, reserving a rent during the term, the rent shall be payable to the heir of the lessor, as incident to the reversion, though the word "heir" be not mentioned in the reservation.—10 *E. 4. 18.—27 H. 8. 19.—5 Co. 112 a, [Mallory's case.]—8 Co. 71, in fine.*

But if a man make a lease of two acres for life, reserving to him and his heirs 12*d.* for the one acre, and reserving 12*d.* for the other acre, his heir shall not have the 12*d.* last reserved, because it was not reserved to him and his heirs, and yet if he had reserved the rent without more saying, the law would say that he and his heirs should have it, but when he said, "reserving to him," the law will not aid him beyond the extent of his words. *Modus et conventio vincunt legem.*—*Plowd. 171 a, [Hill v. Grange.]—21 H. 7. 25, by Kingsmill, 27 H. 8. 19 a.*

*Fine sur conusance de droit come ceo que il ad de son don* shall be intended fee simple.—*Plowd. 248 a, [Willion v. Berkley.]—*

(1) The manuscript has "baron and sonne."—*Ed.*

(2) See *Co. Lit. 9 b.*—*Ed.*

42 E. 3. 5 b, *per Finchden*.—*Brooke, Estate 65, in fine*.—*Fitz. N. B. Fines levied*, 13.—19 H. 6. 22 b.

It was found by an office that the tenant of the king was seised in fee, and did infeoff one A. *habendum sibi in feodo simplici*, without words of "his heirs," *per quod seisitus fuit in fee, et obiit seisitus* his heir within age; this office is good.—*Keilway*, 11 H. 8. pl. 13 b.

A use in fee simple did pass by a bargain and sale of lands without the word "heirs."—27 H. 8. 8 b, and so was the law before 27 H. 8. cap. 10, but after that statute, uses are transferred and made one estate in the land: and therefore if after that statute a man do bargain and sell his lands generally for money, he hath but an estate for life, as *Walmesley, Justice*, 1 Co. 87 b, in *Corbet's case*, affirmeth, contrary to the opinion of *Brooke, tit. Conscience*, 25.—*Vide 8 Co. 94 a.*

If land be conveyed to the king without speaking of heirs or successors, he hath fee simple.—*Keilway*, 7 b.—*Plowd.* 250 a. 294 b.—6 Co. 27 a, [*Case of Soldiers*.]—*Plowd.* 176 b. 457 a. b.

And if the king doth grant an annuity *pro executione alicujus officii vel servitii*, the patentees *non indigent verbo "hereditibus"*, otherwise it is if the king grant a licence for merchandize, &c.—*Dyer*, 92.—*Plowd.* 454, [*Sir Thomas Wroth's case*.]

See sections 739 & 740. If a man doth lease his land to another, to have and to hold to him and his heirs for term of another man's life, and the lessee dieth living *cestui que vie*, his heir shall have the land living *cestui que vie*. So if a man grant an annuity to another to have and to receive to him and to his heirs for term of another man's life, if the grantee dieth, his heir shall have the annuity during the life of *cestui que vie*; but where a lease or grant is made to a man and his heirs for term of years, in this case the heir of the lessee or grantee shall not have the land so let or granted, *causa patet*.—*Et vide inde 10 Co. 87 a*, [*Lovie's case*.] So that hereby we may learn, that not only the rules and maxims of law are to be observed, but the exceptions also, for as *Brooke*, Chief Justice, saith, *non est regula quin fallit*.—*Plowd.* 162 b, [in *Throckmerton v. Tracy*,] and one other saith, exceptions are always of the nature of the rule, and should be within the rule, if they were not excepted, *exceptio firmat regulam in casibus non exceptis*.—*Cosins' Apology*, part 1. 76. *Non in legendo sed [in] intelligendo leges consistunt*.—8 Co. 167. And I suppose it not impertinent in this place to declare, that it behoveth purchasers to foresee, that not only these words "his heirs" be within his deed of feoffment, but also that there be a clause limiting and directing the use of the said conveyance, for

although before the statute *Quia emptores terrarum*, which was made 18 E. 1, if tenant in fee simple had enfeoffed a stranger without any consideration, and without any use expressed, the feoffee should be seised to his own use, because the law did make a sufficient consideration by reason of the tenure remaining, yet after the making of the statute in that case, the feoffee shall be seised only to the use of the feoffor and his heirs, for by that statute the reason of the common law is altered.—*Dr. & Stu. li. 2. cap. 12, 22.*—*Perkins, 583, 638, et seq.*—*Dyer, 146 b*; and in *Dyer, 169*, a deed of feoffment was made for the consideration of several thousand pounds, in this form; *dedit [concessit] et confirmavit, &c. habendum eis et heredibus suis in perpetuum ad proprium [opus et] usum ipsorum A. B. et C. in perpetuum*, omitting *heredum suorum unà cum clausula warranti eis, heredibus et assignatis in forma predicta*, and because of omitting the word *heredibus* in the clause of the use, therefore it was ruled that no greater estate doth pass but for life. Note the cause.

And to conclude this section, Justice Fortescue his words are to be remembered, *viz.* whosoever they be that covet to profit in knowledge of any faculty, they must needs be furnished with principles, for by them are opened the causes final, unto the which, by the direction of reason, through the knowledge of the principles, we do attain. *Unde his tribus, viz. principiis, causis, et elementis ignoratis scientia de quâ ipsa penitus ignoratur*, and the same three being known, the science also whereof they are, is thought to be known, if not determinably or precisely, yet superficially and after a confused and universal sort.—*Fortesc. de Laud. Leg. Angl. 22. [cap. 8.]*

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§ 2. And if a man purchase land in fee simple and die without issue, he which is his next cousin collateral of the whole blood, how far so ever he be from him in degree, may inherit and have the land as heir to him.

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The rule being first laid down how to purchase lands, in this place followeth the like general grounds how, after the death of the purchaser, they shall be directed in a course of descent; and therein it is to be observed that the pre-eminence, and first place, is given by the law to the issue which a man hath of his body, and that is termed "lineal descent," for children are not [only] according to the natural desire of their parents the best heirs, but they are also tokens of God's blessings; *vide Fortescue de Laud, cap. 51.*

124 b. 2 Co. Pref.; and the words in this case are, that the purchaser dyeth without issue (1). *Omnes hæredes in lineâ rectâ descendentes excludunt à successione omnes transversales*, saith Bracton, li. 4. fo. 165 b.

And for default of such issue the next cousin of the collateral line is to succeed, as brothers, sisters, uncles, aunts, 7 H. 7. 7 b. When a man doth claim as heir collateral by the same title as the heir lineal doth, he need not to shew that his ancestor died without heir lineal; or for a daughter to shew, that her father died without issue male. But if a man doth claim by a title which is to commence after the determination of another estate (2), he must shew how that particular precedent estate is determined *pro curia*, and who shall be next cousin inheritable; *vide Bracton, fo. 67. [li. 2. c. 31.] in his verbis*; “*Et sciendum quod cognationum sive parentelæ alia sunt suprâ, alia sunt infrâ, alia ex transverso, sive à latere. Parentes [verò] qui sunt suprâ, dici poterunt antecessores, et parentes;*” *et postea dicit* “*illi verò qui sunt infrâ rectam lineam vel transversalem, dici poterunt rectè cognati et hæredes: illi verò qui sunt suprâ, in lineâ transversali, dici poterunt rectè parentes, et hæredes, deficientibus illis qui sunt inferius.*” and afterwards saith, “*superior autem cognatio parentum, sive antecessorum, qui mortui sunt in lineâ rectâ ascendente est, et incipit a primo gradu [viz.] à patre vel matre ascendente usque ad avum à secundo [gradu scilicet ab avo usque ad proavum a tertio gradu, scilicet a proavo usque] ad abavum, et sic a quarto gradu, scilicet ab abavo usque ad atavum, sic à quinto gradu [scilicet] ab atavo usque ad tritavum, qui obtinet in computacione sextum gradum, ulterius autem non fit computatio ascensus, quia talis computatio excedarèt memoriam hominum; et sic resolvendo a tritavo computato pro patre, vel tritavia pro matre, fieri poterit descensus jure usque ad trinepotem vel trinepstem.*” And he sheweth in another place how, for he saith, *Primo vero gradu sedent pater et mater, qui facient stipitem communem; in secundo verò gradu in lineâ descendente sunt filius [et filia in] tertio nepos et neptis. Vide Bracton, fo. 68. [li. 2. c. 31.]*

(1) See Co. Lit. 10 b.—Ed.

(2) The words “and that title,” were in the MS., but as they do not seem necessary, and even make the passage unintelligible, I have omitted them: they

must either have found their way there by the error of the transcriber, or other words, which would have connected them with what follows, must have been omitted.—Ed.

And concerning this point, viz. that propinquity of blood is considerable in every descent; see in *Plowd.* 447 b. [*Clere v. Brook.*]

The third observation is, he that doth claim as heir must necessarily be of the whole and entire blood, insomuch that the blood which is between every heir and his ancestor maketh him heir, for without blood none can inherit, and therefore it is great reason that he, who hath full and entire blood, shall inherit before others, who have only one part of the blood of the ancestor, for *ordine nature totum præfertur unicuique parti*, and therefore *Bracton* saith, *Quod propter jus sanguinis duplicatum tam ex parte patris, quam ex parte matris, dicitur hæres propinquior, quam frater, de alia uxore*: for as none may be procreated without a father, and a mother, and it behoveth to have in him two bloods, viz. the blood of his father and the blood of his mother, and those two bloods, mixed in him by lawful marriage, constitute and make him heir, so none can be heir to any, unless he have in him both those bloods, from whence he would make himself heir, and therefore the heir of the half blood cannot inherit, because he wanteth one of those bloods which should make him inheritable. As *Aristotle, lib. topicorum, parte quæcunque integrante sublata, tollitur totum, quod verum est, si accipias partem integrantem pro parte necessariâ.* See 3 Co. 41. [*Ratcliff's case*] Where the reason added of this entire blood is, for the avoiding of confusion, for if, as well those of the half blood, as those of the whole blood, should be inheritable, then in many cases confusion and uncertainty would ensue, who should be next heir: and in another place he saith, that in all his time he hath not known two questions made of the right of descents, and of some other titles of the common law, so certain and sure the rules thereof be. 2 Co. Pref. so that to be inheritable these things concur: 1st, Blood; 2d, Entire Blood; 3d, Propinquity of Blood; for *non omnes vocantur ad successionem, quia propinquior excludit propinquum, et propinquus remotum, remotus remotiorem* (1). *Bracton, li. 2. c. 30. See Saltern de Ant. Brit. Leg. cap. 8.*

And upon this reason it is, if a man seised of lands in fee, taketh a wife, also seised of lands in fee, or in fee tail, and have issue, the husband, or, &c. is attainted of felony or treason; the wife, &c. dieth, the son shall not inherit either [as heir] to his father attainted, &c. because of the corruption of blood between them, nei-

(1) See Co. Lit. 10 b.—Ed.



ther as heir to his mother (1), for now he wanteth one of the bloods necessary for to make him an heir. 3 Co. 42. [*Ratcliff's case*]. 13 Hen. 7. 17 a. See 8 Co. 71. [*Paine's case*]; and 9 Co. 139 a. [*Beaumont's case*].

And out of *Bracton* aforesaid it is well collected, that every one that is heir to another *aut est hæres jure proprietatis*, as the eldest son shall inherit only, before all his brothers, *aut jure representationis*, as when the eldest son doth die in the life of his father, his issue shall inherit before the second son, for though the younger son be *magis propinquus* to the father, yet *jure representationis* the issue of the eldest son shall be heir, for such issue doth represent the person of his father, and *jus proprietatis*, which his father had by his birth-right, doth descend unto him *aut jure propinquitatis*, *aut jure sanguinis* (2). 3 Co. 41. in *Ratcliff's case*.

But note, in case of descent of the Crown, there is no respect of the half blood. *The Speech of the Lord Chancellor, in the Case of the Post-nati*, p. 36: there you may read of certain other cases, wherein the law of the Crown doth not accord with the rules of the law, which doth construe the subjects, and this was in practice in the reigns of Queen Mary and Queen Elizabeth. 7 Co. 23. in *Calvin's case*; where also the reason thereof is alleged; viz. because the king doth take his land in this case in his body politic, *propter utilitatem*, "and therefore doth differ from the descent lineal.

§ 3. But if there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee simple, and die without issue, living his father, the uncle shall have the land as heir to the son, and not the father, yet the father is nearer of blood; because it is a maxim in law, that inheritance may lineally descend, but not ascend. Yet if the son in this case die without issue, and his uncle enter into the land as heir to the son (as by law he ought), and after, the uncle dieth without issue, living the father, the father shall have the land as heir to the uncle, and

(1) There is a difference in 3 Co. 42, in *Ratcliff's case*, where the issue is born before the attainder of the father, the heir is inheritable to the mother; other-

wise it is, where the issue is born after the attainder of either ancestor. Note in *MS*.

(2) See Co. Lit. 10 b.—Ed.

not as heir to his son, for that he cometh to the land by collateral descent, and not by lineal ascent.

This case is an exception from the general rule before mentioned; for in this section Littleton affirmeth, that the father or mother are next of blood unto their son, but cannot inherit, and upon these words of Littleton was concluded 3 Co. 40 [*Ratcliff's case*]. In the same case, of father, uncle, and son, if a lease be made unto the son, the remainder unto the most next of his blood, that the father (1), in case of purchase, shall have the remainder; for by the judgment of Littleton he is the most next of blood, and the contrary opinion, which before time hath been conceived, in the 5 E. 6. *Brooke, tit. Administration, 47*, is not law, but hath been divers times resolved otherwise; which opinion was, *quod pueri sunt de sanguine parentum sed pater et mater non sunt de sanguine puerorum*. And Littleton doth give his case only by the maxim in the law, without shewing any other reason wherefore such a maxim should be; for in every art or science are *principia et postulata*, of which it is said, *altiora ne quæsieris, et principia probant, et non probantur*; because every proof ought to be [by] a more high and supreme cause [and] nothing can be more high and supreme than the principles themselves, and therefore they must be approved, because they cannot be proved. 3 Co. 40 a [*in Ratcliff's case.*] *Vide Doct. & Stud. li. 1. c. 8*, wherein it is said, the maxims are of the same strength and effect in the law, as acts of parliament are; *vide Fortesc. de Laud. cap. 8. fo. 18*; and yet because the common law doth in this case differ from the civil law, three causes and considerations for the common law are shewed; the first is, the consent of all writers upon the said common law, viz. Glanville, who did write in King Henry the Second's time, *li. 7. c. 1, fol. 43 b*, saith, *qualibet hæreditas naturaliter quidem ad hæredes hæreditabiliter descendit, nunquam autem naturaliter ascendit*, and Bracton also, who writ in the time of Henry the Third, *li. 2. c. 29. fo. 62 b*, *descendit itaque jus, quasi ponderosum quid cadens deorsum rectâ lineâ vel transversali, et nunquam reascendit [eâ via quâ] descendit post mortem antecessoris*, for *omne grave deorsum fertur*; and with this doth agree Britton, who writ in the time of Edward the First (2), *cap. 119, de successione*.

(1) The same remark is made in this section in Co. Lit. 10 b.—Ed.

(2) It may be worthy of observation, that Lord Coke makes a similar digres-

sion on the word "maxim," and follows nearly the same course, referring, amongst others, to the same authorities. Co. Lit. 11 a.—Ed.

The second reason of this maxim is, for the avoiding of confusion in cases of descents, if not only lineal and collateral descents should be allowed, but lineal ascension also; which is one of the causes of such diversity of opinions [in] cases of descents in the civil law, and the contrary is one of the causes of the certainty of the rules of the common law, in cases of descents and inheritance.

The third cause is, because in this point, and in almost all others, the common law is founded upon the law of God, which is *causa causarum*; for it appeareth in the 27th chapter of Numbers, where the case which was in judgment before Moses was, that Salphaad had issue three daughters, and having divers brothers, died, to whom his inheritance should descend was the question, the daughters claiming it *jure propinquitatis* as their birth-right, and as next heirs unto their father, and the brothers claiming it as heirs male *jure honoris*, to celebrate and continue the name of their ancestors, and this case seemed of great difficulty unto Moses, and therefore, for the decision of this question, Moses doth consult with God; for the text saith, *retulitque Moses causam earum ad judicium Domini, qui dixit ad eum, justam rem postulant filia Salphaad. Da eis possessionem inter cognatos patris sui, et ei in hereditatem succedant. Ad filios autem Israel loqueris hæc: homo eum mortuus fuerit absque filia, ad filiam ejus transibit hereditas, si filiam [non] habuerit [habebit] successores fratres suos, quod si fratres non fuerint, dabitur hereditatem fratribus patris ejus; sui autem nec patruos habuerit, dabitur hereditas his qui ei proximi sunt, eritque hoc filiis Israel [sanctum] lege perpetua, sicut præcepit Dominus Mosi.* By which general law, and which doth not only extend to the said particular case, but to all other inheritances, to all persons, and for ever, it doth appear, that the father himself and all lineal ascension, is excluded. *Vide 3 Co. fo. 40 [in Ratcliff's case], and in Saltern de Ant. Brit. Leg. c. 8.* And some are (1) of opinion, that this maxim seemeth to savour of the law of the Twelve Tables, being the most ancient part of the civil law written, whereby the mother was forbidden to succeed in the inheritance of her child. *Vide Swinburne, Testaments, pt. 7. fo. 298.*

(1) Lord Coke says, more positively, "and in prohibiting the lineal ascent, the common law is assisted with the law of the Twelve Tables;" but Mr. Hargrave remarks on this passage, "the mother was indeed excluded; but it was not because the law of the Twelve Tables did

not permit lineal ascent, but on account of her sex, the law preferring the *agnati*, or those related through males, and excluding the *cognati*, or those related through females." Harg. Co. Lit. n. 57. Ed.

If the son purchaseth lands in fee, and die without heir of his body, the land shall descend to his uncle, and shall not ascend to his father. But if the father have a son by the same mother, though it be many years after the death of the elder brother, yet that son shall put out his uncle, and inherit the land as heir to his elder brother, for ever. *Dr. & Stu. b. 1. cap. 7*; as where a man doth die seised in fee, having issue a daughter, and the daughter enters, and after a son is born, he shall put out the daughter, and this is, in descents, contrary to remainders, purchases, and such like. *Brooke, tit. Descents, 58. Vide Plowd. 374 b, by Weston and Dyer [in Stowel v. Lord Zouch].—Bracton, lib. 2. fo. 64, saith, quidam incipere possunt esse hæredes [et] desinere, et quidam non. And see more of this matter in section 12. Quia frater præferendus.*

And observe in 7 Co. 8 b, though the child *in utero matris est pars viscerum matris*, yet the law in many cases hath consideration of him, in respect of the apparent expectation of his birth. The father or mother cannot have an appeal for the death of their son or daughter, because the appeal is given only to the party that is heir by descent, which they cannot be, 17 E. 4. 1, *Stamf. P. C. 61*. But by the express words of the statute 6 R. 2. c. 6, appeal of rape is given unto the father or mother. *Stamford, ibid.*

The father or mother shall be *proximi de sanguine* to take administration by the statute 21 H. 8. c. 5, *Dyer, 59 b.—3 Co. 40 [Ratcliff's case], and of this matter read a larger discourse in Swinburne's book of Testaments, fo. 297 a, et seq.* If father and son be, the son is attainted of felony in the life of his father, and pardoned by charter, he cannot have an appeal of the death of his father, for now he is not his heir, because of the corruption of blood, and appeal ought to be brought as heir. 1 E. 3. fo. 3 b. *pl. 19.*

If father, uncle, and son be, the son purchaseth land and dieth without issue, and the land descendeth to the uncle, and the uncle dieth before his entry, the land shall not descend [to] the father, for then he must make himself heir to him, who was last actually seised, and that was the son; and therefore Littleton saith in this case, if the uncle enter, &c. then the father shall have the land as heir to the uncle, for it is a rule in the law, that of all hereditaments in possession, he that doth claim such hereditaments, as heir, ought to make himself heir unto him who was last actually seised (1), 11 H. 4. 11. 10 Ass. 27. 34 Ass. 20. 19 E. 2. tit. Quar. Imped. 177. 45 E. 3. 13. 3 Co. 42 a [*Ratcliff's case.*] And therefore if there

(1) See Co. Lit. 11 b.—Ed.

be father and son, and the father have two brothers, who are uncles to the son, and the son purchaseth lands in fee simple, and dieth without issue, living his father, who is youngest brother to the two uncles, in this case if the eldest uncle do enter, and die without issue, his second brother shall have the land as next heir to the brother, and not the father of the purchaser, for he is the youngest.

In this case it is not put in certainty that the uncle is the eldest brother to the father, and therefore if that case be admitted, that the uncle is the younger brother, yet it sheweth he shall inherit, though his eldest brother be then living, and he is incapable only by that maxim; as in case where an alien born hath his eldest son also an alien, the father made denizen, after which he hath issue a younger son in England, if the father purchase lands after his denization, and dieth, the second son shall inherit, and not the eldest. *Dr. & Stu. li. 1. c. 7. fo. 13 a. Brooke, Denizen, 19.—22 H. 6. 38, by Prisot*, for in this case is no corruption of blood, though the succession is prohibited to the elder brother by the maxims of law. So if a man seised of land, have two sons, the eldest entereth into religion, and is profest, the father dieth, the younger son shall enter as heir to his father, although his eldest brother be in natural life. So if the father have issue a son, and after the father is attainted of felony or treason, and pardoned by the king's charter, after which he purchaseth lands and hath issue also a younger son, then the father dieth, living both his sons, in this case the younger shall inherit, and not the elder.

A man taketh an inheritrix to wife, seised in fee, hath issue by the (1) wife, is attainted of felony and pardoned, after which hath another son or daughter by the same wife, then the mother dieth, the eldest shall not have the mother's inheritance, but the youngest. *Vide 13 H. 7. fo. 17 a. Vide in Dyer, 332 b, and in 8 Co. 72 [Pain's case], and 9 Co. 139 [Betaumont's case], and 3 Co. 41 a, b. [Ratcliff's case].*

By the ancient common law, and before the statute *quia emptores terrarum*, if the eldest son had enfeoffed his father, or any other his brethren, to hold of him by homage, now by this tenure the feoffor could not be heir unto his feoffee, *quia non potest quis esse dominus et hæres*; yet after the death of such feoffee, the land should not escheat, by reason of that legal disability or incapacity in the next person, to whom by right of blood the inheritance should descend, but the next brother or cousin shall inherit to the feoffee, that im-

(1) The MS. has "husband," which is undoubtedly a mistake.—Ed.

pediment notwithstanding. *Stamford's Prerog. cap. 5. fo. 23 b. Brac. li. 2. fo. 24.*

Concerning this word "maxim," which here is last mentioned, Fortescue, c. 8. fo. 21, saith, that our law and the mathematicians do so term them, which rhetoricians do call paradoxes, and the civilians term them rules, but some other say that the word "maxim," is abusively so called. *See Cosin's Apol. pt. 3. c. 7.*

§ 4. And in case where the son purchaseth land in fee simple, and dies without issue, they of his blood on the father's side shall inherit as heirs to him, before any of the blood on the mother's side: but if he hath no heir on the part of his father, then the land shall descend to the heirs on the part of the mother. But if a man marieth an inheritrix of lands in fee simple, who hath issue a son, and die, and the son enter into the tenements, as son and heir to his mother, and after dies without issue, the heirs of the part of his mother ought to inherit, and not the heirs of the part of the father. And if he hath no heir on the part of the mother, then the lord, of whom the land is holden, shall have the land by escheat. In the same manner it is, if lands descend to the son of the part of the father, and he entereth, and afterwards dies without issue, this land shall descend to the heirs on the part of the father, and not to the heirs on the part of the mother. And if there be no heir on the part of the father, the lord of whom the land is holden, shall have the land by escheat. And so see the diversity, where the son purchaseth lands or tenements in fee simple, and where he cometh to them, by descent on the part of his mother, or on the part of his father.

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This case and diversity is proved by these books, 49 E. 3. 12.—39 E. 3. 30.—12 E. 4. 14. But because elsewhere the same diversity is more at large and distinctly set down, here followeth the resolutions of the justices in the points, viz. (1). First, in collateral

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(1) The following prolix exemplification of the rule, it will be seen, is taken verbatim from the case referred to in Plowden: numerous omissions in the manuscript, (which would otherwise have been unintelligible) have been replaced from

thence. In what way those omissions arose will be clear to any one who will observe how frequently the concluding word in the passage in the manuscript, is the same as in that inserted from the Report.—Ed.

descents, from any who doth purchase lands and dieth without issue, the heirs of the part of the father, and which be of the blood of the ancestors males, and in the lineal ascension of the father, shall be preferred in the descent, before the heirs, which be of the blood of the females in the lineal ascension by the father, in the same degree. As the brother of the grandfather of the part of the father, and their issues, [be they males or females, shall be preferred before the brother of the grandmother of the part of the father, and their issues], and so the brother of the great grandfather of the part of the father, viz. the brother of the father [of the father of the father] of the purchaser and their issues, be they males or females, shall be preferred before the brother of the great grandmother, [of the part of the father] scilicet [before] the brother of the mother of the father [of the father] of the purchaser, and their issues; for the males be more worthy than the females, for man is the most precious creature God did make upon the earth, and woman is more base than the man; and Adam was first made as the principal, and Eve the second as inferior, but Adam, being the chief, was her protector and governor, and she, as a thing more feeble, was adjoined unto him, to be protected and governed as his companion in an inferior degree; and forasmuch as man doth proceed of matrimony, which is between a man and a woman, so that every man hath a father and a mother, and so is descended of two branches, (scil.) male and female, and the one is more worthy than the other, it is consonant to nature, that if he doth purchase lands and die, not having issue to inherit, that it shall go unto the line whereof he is descended, and forsomuch as he is descended of two lines, (scil.) male and female, and the one is more worthy than the other, that it shall go unto the more worthy, and the more worthy that his line is, to whom the land shall go, the more pleasing it is to the purchaser; for it is a natural desire which a man hath, that the things which he doth possess, and principally his inheritance, after his death, shall go unto persons rather worthy than base; and therefore the law, which doth make ordinances according to the disposition and minds of men, hath prepared that descents for heritage shall go accordingly, (scil.) unto the race which is more worthy, than unto the race which is less worthy, and unto the more precious than unto the more base; and therefore the brother of the grandfather of the part of the father, shall have it before the brother of the grandmother of the part of the father; for the brother of the grandfather, is son to the great grandfather, and so doth come of a

more worthy race. And if the grandfather hath no brother, but a sister, it shall descend unto the sister, and unto her line, rather than unto the brother of the mother of the father of the purchaser; for the sister of the grandfather, was daughter unto the great grandfather, and so doth come from a race of males, from which the purchaser did come, and so from a race more worthy. And as it is said of the brother of the grandfather of the part of the father, and of the brother of the grandmother of the part of the father, and of their issues, so it shall be of the brother of the [great] grandfather or [great] great-grandfather [on the part of the father] and their issues, and of the brother of the [great] grandmother, and [great] great-grandmother, of the part of the father, and of their issues, and so of every other in the lines ascending. Also it is agreed by the court, that if the purchaser doth die without issue, and hath not any heirs of the part of the father, that the land shall descend to the next heir of the part of the mother, and this shall be understood of the heirs of the race of the males from whom the mother is descended before others; as for example, the grandfather of the mother of the purchaser (scil.) [the father of the father of the mother of the purchaser, hath a brother, and the grandmother of the mother of the purchaser (scil.)] the mother of the father of the mother of the purchaser, hath another brother, there if the purchaser do die without issue, not having heir of the part of the father, the brother of the grandfather of the mother, (scil.) the brother of the father of the father of the mother, shall have the lands by descent, and not the brother of the grandmother of the mother, (scil.) the brother of the mother of the father of the mother of the purchaser, for such a brother of the grandfather of the mother, is of a more worthy race, for he is the son of the great-grandfather of the mother, who shall be preferred before the brother of the grandmother of the mother, for he is son unto the great-grandfather of the mother in another race, (scil.) in a race which was conjoined unto the race of males, whereof the mother of the purchaser did descend, by marriage of the woman, (scil.) by marriage of the grandmother of the mother of the [purchaser, to the] grandfather of the mother [of the purchaser,] and therefore the brother of the grandfather of the mother of the part of her father, and their issues, shall be heirs unto the purchaser, and not the brother of the grandmother of the mother of the purchaser, nor their issues; for the brother of the grandmother of the mother cannot be heir unto the purchaser, so long as the grandfather of the mother of the purchaser of the part



of her father, hath a brother. And it was also agreed by the court, that if the purchaser of land have issue a son, and dieth, and the son enter, and dieth without issue, and without heir of the part of the father of his father, that the heir of the part of the mother of his father shall have the land by descent, and so it was holden, 12 E. 4. [14, pl. 12,] before mentioned, but the heir of the part of the mother of such issue shall never inherit in such case, but the land shall rather escheat; for all wives, taken by any issue after the purchaser, are estranged to the blood of the purchaser, and therefore their lineage shall be estranged to the land; for the land as unto descent shall taste of the first purchaser and of his blood, in which it did first attach, and shall descend always unto the blood of the first purchaser only, and not unto the blood of wives that have annexed themselves in that race afterwards; for they be but of alliance to the first purchaser, and not of blood, and the land shall [descend] unto blood, and not unto alliance without blood; so that for descent no marriage is to be respected, but the marriage only of the father and the mother of the purchaser, who did precede the purchaser; for no marriage afterwards shall make any inheritable unto the land so purchased. And Manwood, Justice, said, there will never be any confusion, if the most worthy of the blood shall be preferred; for where they are in equal dignity of blood, the nearest shall be preferred: as if the purchaser doth die without issue, and the brother of the father doth claim the land, and the brother of the grandfather (scil.) of the father of the father, likewise doth claim the land, &c., and the brother of the [great] grandfather of the purchaser, that is to say, of the part of the father in the lineal ascension of males, likewise doth claim the land, there the brother of the father of the purchaser shall be preferred as heir; for he is next of blood to the father of the purchaser, and they all be in like dignity of blood; for they all be of the blood of males, the which is the most worthy sex, and therefore the next shall be preferred as heir; and if there is not any such brother, or issue, which is come of the brother of the father, nor of any sister of the father, (for the sister shall be in the same degree as the brother should be, where there is not a brother,) then the brother of the grandfather, or his issue, shall be preferred, or the sister of the grandfather, or her issue, before the brother or sister of the great-grandfather, or their issues, and so on *in infinitum*. And so, the heir of the part of the grandmother, that is to say, the brother or sister of the mother of the father, shall be preferred before the heir of the *proavia* or [great]

grandmother, (scil.) the brother, or the sister, of the [great-] grandmother, who was mother of the father of the father of the purchaser, because they be of like dignity, (for such heirs do come of the blood of the feminine sex, whereof the father of the purchaser did issue) and in like dignity the next of the blood shall always be preferred as heir. But if the purchaser die without issue, and he that is brother of the grandmother of the part of the father, (that is to say) the brother of the mother of the father of the purchaser, demand the heritage, as heir to the purchaser, and another that is brother or sister to the great-grandfather of the purchaser, (that is to say) brother or sister to the father of the father of the father of the purchaser, doth claim also, as heir to the purchaser, there he, (that is to say) the brother or sister of the great-grandfather, shall be preferred as heir, before the other, and yet the other is more near of blood, but he is of less dignity of blood, for although he doth come of the blood of the part of the father, yet it is annexed by a woman, but the other is annexed by male blood in all, for the brother or sister of the great-grandfather, was son or daughter to the great-great-grandfather, and therefore an heir from them doth exceed the heir of the other in dignity of blood.—*Plowd.* 444, *et seq. in Clere v. Brook.*

But if a man have a house from the part of his mother, and one doth grant to him and his heirs, that he shall have competent housebote to be burned in the same house, that is appurtenant to the house; therefore though it be a new purchase, yet it shall go with the house to the heir of the part of the mother. The same law is, if a man have a rent-seck by descent, from the part of his mother, and the tenant doth grant to him and his heirs, that he may distrain for the rent, &c., this is appurtenant to the rent, and shall go with the rent unto the heir of the part of the mother (1).—8 *Co.* 54 *a.*

It is also in this place shewed, that if there be not an heir such as the law alloweth to succeed in the inheritance, then the lord, of whom such land is holden, shall have the land by escheat. The reason whereof is, because it beloveth, for divers causes, that the freehold and inheritance be always in some one or other, and amongst others, one special cause is, that he, who hath right or title to the land, may know against whom he may demand it, and bring his *præcipe*, and for that inconvenience the freehold shall not be in suspense.—*Plowd.* 229 *b.*, [*Willion v. Berkley*,] *Dyer*, 71 *a.*

(1) Lord Coke makes the same observation, and adds the reason, "for now is

the rent-secke become a rent-charge." *Co. Lit.* 13 *a.*—*Ed.*

The common law, though in some cases it doth suffer the fee simple to be in abeyance for a short time, yet it will never suffer the freehold to be in suspense, but doth abhor the suspension of freeholds, as *natura abhorret vacuum*, *Sir John Davies' Rep. 34 a. Nota Litt.* And at the common law, the king and any other, seised of lands in fee simple, might thereof infeoff any man to hold of him and his heirs; and therefore the law and reason required, that when such tenant did die without issue, and without any other heir, who lawfully might succeed, that in such case for default of a lawful tenant, the tenancy should revert to the lord, from whom it was derived; which manner of creation of the tenure of the feoffor and his heirs, though it was allowed by the statute of *Quia emptores terrarum*, made 18 E. 1, so that at this day and ever since, the feoffee must hold of the lord paramount, and not of the feoffor; yet that lord paramount is to have the escheats, as the feoffor should before the making of that statute. Therefore Bracton, who did write in the reign of Henry 3, saith, *succedit quis alteri, vel quasi succedit, non quidem jure hæreditario, ut hæres, sed propter defectum hæredis, vel delictum, sicut capitalis dominus [vel] feoffator in escheatum suum. Li. 2. c. 31. fol. 68 b.* And he also saith, *Si de necessitate vel [pro] defectu hæredum, vel propter delictum, jus proprietatis ad donatorem, vel ad dominum capitalem revertatur, qualitercunque, ut escheata, licet hæres non sit, et in aliquo casu, loco hæredis, propter terram, quæ ad ipsum revertitur in dominico, seisinæ semper sequetur ipsum cum sit loco hæredis, licet non sit hæres, et cum eo permanebit hæreditas, ut escheata, et extinguitur homagium, et servitium, cum non sit hæres qui petere possit, [vel] qui petat. Li. 2. c. 30. fo. 66 b.*

And note the cause in Co. 4. 125 a, if one of *non compos mentis* do make feoffment, by letter of attorney, and after dies without heir, the land shall escheat; like unto the case of an infant, if he make a feoffment in person, and dieth without heir, the land shall not escheat, but otherwise it be if it be by letter of attorney.—*Vide Browne, 28 H. 8. fo. 10. pl. 28.*

*Escheat* (1). *Escheat* cometh of the French *escheoir, cadere, accidere, excidere*, and signifieth, in our common law, any lands or other profits, that fall to a lord within his manor by way of forfeiture, or the death of his tenant dying without heir general, or special, leaving his heir within age or unmarried.

(1) See Co. Lit. 13 a.—*Ed.*

§ 5. Also if there be three brethren, and the middle brother purchaseth lands in fee simple, and die without issue, the elder brother shall have the land by descent, and not the younger, &c. And also if there be three brethren, and the youngest purchase lands in fee simple, and die without issue, the eldest brother shall have the land by descent, and not the middle, for that the eldest is most worthy of blood.

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As in the precedent section the dignity of the heir male, before the female, is shewed; so in this case it is again pursued; and further, when divers competitors males are of one heritage, [and] they are all of the same degree of sex and kindred, the eldest shall be preferred, for he is most worthy of blood, so we see, 1st. That the law doth require, that the heir be of the same blood: 2d. That he be of the whole blood: 3d. That he be the next of blood: 4th. That he do descend from the more worthy sex: 5th. Of competitors of the same degree *primogenitus* hath place, for he is most worthy of the same blood and degree. *Item in linea recta descendente sunt propinqui, et propinquiores, et si plures filii venientes ab eo, à quo descendit hæreditas, omnes quidem sunt propinqui, sed ante-natus propinquior propter ætatem.*—Bracton, li. 4. fo. 265 b. And here it is said, that the eldest is most worthy of blood, and according, see in *Sir J. Davies' Rep.* 30 a, [*Case of Tanistry.*] But in section 210 it is said, that every son is as great a gentleman as the eldest son is.

This law of *primogenitus masculus* was originally brought into this realm by the Saxon (1) Conquerors, amongst whom the law was, that the eldest male should only inherit; and in time it came to be the common law of this land, except amongst the Britains, who were by them chased into the remote places of the kingdom, and amongst them in Kent, (who were never conquered) for amongst them the law of gavelkind, which was more ancient, had still continuance, as Brooke, Chief Justice, declareth (2), in *Plowd.* 129 b. But others say, that this law of *primogenitus* was not amongst the Saxons, but was the ancient common law of England, though by custom in some particular places, it was used otherwise, (scilicet)

(1) See Co. Lit. 14 a, and Mr. Hargrave's note.—Ed.

(2) In the case referred to, Buckley v. Rice Thomas, Brooke, C. J. speaks only of Wales.—Ed.

according to custom gavelkind or burrough English.—*Vide Saltern de Ant. Britt. Leg. c. 8. fo. 3.*—*Cosin's Apology, part iii. c. 6, and the book, entitled The Restitution of decayed Intelligence, 57; and Lambert's Customs of Kent, 390.*

§ 6. Also, it is to be understood, that none shall have land of fee simple by descent as heir to any man, unless he be his heir of the whole blood. For if a man hath issue two sons by divers venters, and the elder purchase lands in fee simple, and die without issue, the younger brother shall not have the land, but the uncle of the elder brother, or some other his next cousin shall have the same, because the younger brother is but of half blood to the elder.

Concerning the entire whole blood, here mentioned necessary to make an heir, it is before said sufficient in the second section; but in this place [(1) as well as] in the former, this is to be understood of an heir to fee simple lands only; for the brother of the half blood may, by the law, be heir of intailed lands *per formam doni*, and therefore Littleton in this place doth say, that none shall have lands in fee simple by descent, as heir unto any man, unless he be his heir of the whole blood, the which words, *feodum simplex*, do exclude estate tail.—3 Co. 41*b*, 42*b*, in *fine*, [*Ratcliff's case.*].—*Vide in Plowd. 56, 57 a, [Wimbish v. Tailbois.]*

§ 7. And if a man hath issue a son and a daughter by one venter, and a son by another venter, and the son of the first venter purchase lands in fee and die without issue, the sister shall have the land by the descent, as heir to her brother, and not the younger brother, for that the sister is of the whole blood of her elder brother.

In this place Littleton doth prosecute his last assertion, and sheweth that by cause only of the whole blood, the sister shall be preferred to be heir, before the brother of the half blood, *scilicet*, the feminine sex before the masculine.

(1) These words seemed necessary to complete the sentence.—*Ed.*

§ 8. And also, where a man is seised of lands in fee simple, and hath issue a son and daughter by one venter, and a son by another venter, and die, and the eldest son enter, and die without issue, the daughter shall have the land, and not the younger son; yet the younger son is heir to the father, but not to his brother. But if the elder son doth not enter into the land after the death of his father, but die before any entry made by him, then the younger brother may enter, and shall have the land as heir to his father, But where the elder son, in the case aforesaid, enters after the death of his father, and hath possession, there the sister shall have the land, because *possessio fratris de feodo simplici facit sororem esse hæredem*. But if there be two brothers by divers venters, and the elder is seised of land in fee, and die without issue, and his uncle enter as next heir to him, who also dies without issue, now the younger brother may have the land as heir to the uncle, for that he is of the whole blood to him, albeit he be but of the half blood to his elder brother.

In this case he doth maintain that which was before affirmed of the whole and entire blood; for in respect thereof the feminine shall be preferred before the male; and doth set down the rule or maxim *quod possessio fratris de feodo simplici facit sororem esse hæredem*; in which rule every word is to be observed; first, that the brother ought to be in actual possession of [the] fee and frank-tenement, either by his own act, or by the actual possession of another; for if neither by his own act, neither by the possession of another, he do gain more than did descend unto him, the brother of the half blood shall inherit; and therefore if land, rent, advowson, &c. do descend unto the elder brother, and he die before entry made by him in the land, or receipt of the rent, or presentment unto the church, the younger brother shall inherit; (311. 7. 5 a) and the reason is, because of all hereditaments in possession, he who will claim such hereditaments as heir, must make himself heir unto him who was last actually seised, as before in the [third] section is shewed. But if the eldest son enter, and by his act have gained the actual possession, or if the land were in lease (1) for years, or

(1) See Co. Lit. 15 a.—Ed.

in the hands of a guardian, and the lessee, or guardian, do possess the land, there the possession of the lessee, or guardian, doth vest the actual fee and frank-tenement in the eldest brother. *Vide* 6 Co. 57 b. [*Brediman's case*] and in that case, the sister shall inherit as heir unto her brother, who was last actually seised. But of a reversion (1) or remainder, expectant upon an estate for life, or in tail, there he that doth claim the reversion, as heir, ought to make himself heir unto him who made the gift, or lease, if the reversion or remainder do descend unto him; or if a man do purchase such a reversion, he that claims as heir ought to make himself heir unto the first purchaser, as by many books cited in 3 Co. 42 a [*Ratcliff's case*] may appear; and by that which hath been said, it appeareth, that if a king, by his letters patent, doth create a baron, and doth give the dignity to him and to his heirs, and he hath issue a son and a daughter by one venter, and a son by another, and dieth, and after the eldest son dieth without issue; in this case the dignity shall descend unto the youngest son; for it cannot be said that the eldest son was in possession of the dignity, no more than of his blood, for the dignity is inherent to his blood, and neither by his own act, nor by the act of any other, hath he gained more actual possession, if so it may be called, than by the law did descend to him; and then the younger brother may make himself heir unto his father, and not unto his brother; so that this word "possession," which is as much as *pedispositio*, doth extend only unto things, of which a man by his entire or other act may acquire actual possession. Also these words *feodum simplex*, do exclude estate tail as in the sixth section. *Vide in Plowd. fo. 57 a* [*Wimbish v. Tailbois*]. 3dly. *Facit sororem esse hæredem*, by which is implied, *quod in hoc casu soror est hæres factus*, and that the law, without some other act, doth not make the sister heir, but the younger brother after the death of the elder brother, is *hæres natus* to his father, but the act, by which the eldest brother doth gain actual possession, *facit sororem esse hæredem*; so that when the eldest son hath not actual possession, or if it be such an inheritance, where any actual possession cannot be gained, *per pedis positionem*, or by other act, this by the law shall descend to the brother of the half blood. 3 Co. 41 b, et seq. [*Ratcliff's case*.]

(1) See Co. Lit. 15 a.—Ed.

A man hath a son and a daughter by one venter, and a son by another, and in assize of *mort d'auncestor*, the eldest son by false verdict is barred, and after he dieth, the daughter shall have the attain, because she is heir to her brother, and not the son of the half blood; and when she is restored, the brother of the half blood shall have the land, because the eldest brother was never in possession of the land. *Keilw.* 119 b. And then the proverb is, "one such beat the bush, the other shall have the bird." *Plowd.* 57 a. [*in Wimbish v. Tailbois.*]

§ 9. And it is to wit, that this word (*inheritance*) is not only intended where a man hath lands or tenements by descent of inheritance, but also every fee simple or tail which a man hath by his purchase may be said an inheritance, because his heirs may inherit him. For in a writ of right which a man bringeth of land that was of his own purchase, the writ shall say, *quam clamat esse jus et hæreditatem suam*. And so shall it be said in divers other writs which a man or woman bringeth of his own purchase, as appears by the Register.

In this place is shewed the true understanding, according to the law, of this word "inheritance," which also Littleton declared in the first section; for there he saith, *feodum* (by purchase) *idem est quod hæreditas*; so afterwards, sect. 732; whereto agreeth *Plowd.* 464 a [*in Eystan v. Studd*] and 58 a, b, by Montague, Chief Justice [*in Wimbish v. Tailbois*] whereby the student is to learn, and this way to observe, the sense and operation of the words of the law, which many times differ from the common vulgar understanding of them; *et ignorantia juris non excusat*, 2 Co. 3b [*in Mancerv's case*]: and for proof of his opinion aforesaid, he voucheth the Register of Writs original, which book is most ancient of any book of the common law, and of greatest authority. 10 Co. Pref. fo. 8 a; and in it are contained the principles and fundaments of the common law, as Fitzherbert, in his preface to his book called *Natura Brevium*, doth declare, and *Plowd.* 74 a, 3 Co. 38 a [*Ratcliff's case*], Dr. & Stu. lib. 1. cap. 9. in *fine*, and *Calye's case*, in 8 Co. 63 a: whereby appeareth how judicious the opinion of Justice Fitzherbert



was, and how truly he citeth (1) the principles of the law, and fortifieth the opinion of Bracton, *li. 5. fo. 415*, where he saith, that *breve formatum est ad similitudinem regulæ juris*, which case before mentioned in 8 Co. the Chief Justice hath reported in that form, to this end, that students seeing the singular case of original writs, will, in the beginning of their study, learn them, or at least the principal of them, without book, whereby they shall attain unto three things of no small moment; 1st. to the right understanding of their books; 2d. the true sense and judgment of law; and lastly, to the exquisite form of pleading. 8 Co. Pref. 5b.

§ 10. And of such things, whereof a man may have a manual occupation, possession, or receipt, as of lands, tenements, rents, and such like, there a man shall say in his count countant, and plea pleadant, that such a one was seised in his demesne as of fee. But of such things which do not lie in such manual occupation, &c. as of an advowson of a church and such like, there he shall say, that he was seised as of fee, and not in his demesne as of fee. And in Latin it is in one case, *quod talis seisitus fuit in dominico suo ut de feodo*, and in the other case, *quod talis seisitus fuit, &c. ut de feodo*.

In this section is a point of artificial pleading, the science whereof Littleton saith afterwards (s. 534), is one of the most honorable, laudable, and profitable things in our law; honorable, for he cannot be a good pleader, but he must be [of] excellency in judgment, *honor est præmium excellentiæ*; laudable, for the fame and estimation of the professor, *laus est sermo elucidans magnitudinem scientiæ*; 3dly, and profitable, for three respects; 1. for that good pleading is *lapis lilius*, the touchstone of the true sense of the law; 2dly, to the client, whose good cause is often lost or long delayed for want of good pleading, for herein is *occasio præceps et*

(1) The manuscript in this place is rather obscure, and seems to have "called the opinion," instead of "citeth the principles:" the reading in the text is better connected with what precedes, and pro-

bably the word "opinion" may have crept in from the negligence of some transcriber, that word occurring twice in the prior and subsequent lines.—Ed.

*experimentum periculosum*; lastly, to the professor himself, who being for skill therein exalted above others, *tanquam inter viburna cupressus*, it cannot but be unto him exceeding profitable. *Co. to the reader, before his new Book of Entries, fo. 1 a*; for to obtain to the knowledge of good pleading, the great Book of Entries is of singular use and utility. *3 Co. Pref. fo. 2 a*; and so are Plowden's Commentaries; *vide his preface to his first part, 1 b*; and especially the new Book of Entries made by Coke, Chief Justice of England; *see hereof also in 14 H. 8. 26 b*, by Brooke, Chief Justice, that a form must be holden and used, or otherwise all things shall be in confuse, and without order; for in actions of trespass a colour must be given, and yet the sentence is not the better, nor the truth of the matter, for it is but formality; and to a plea in the affirmative must be an averment, and if it be in the negative, the conclusion must be in the negative, and this is but formality, but formality is the most chief thing in our law. *France, [Lawyer's Logic] fo. 24 b.* whereto he addeth, that the formality in pleading is now partly abridged by the stat. *32 H. 8. cap. 20*, and *8 Eliz. cap. 14*, and *27 Eliz. 5*; and read in *5 Co. 35, 36, [Playter's case.]*

And *quod sit dominico suo*, Bracton mentioneth; *li. 4. tr. 3. c. 4. fo. 255*, and in Plowd. 191 [*Wrotesley v. Adams.*] "demesne," is properly said, when a man hath the thing in possession; but sometimes, as for the king's benefit, this word (demesne) is taken more largely. *Stamf. Pr. Reg. c. 1. fo. 8 a.* An assize was brought of a portion of tithes, wherein exception was taken to the pleading, which was *de portione decimarum in dominico suo ut de feodo*, but it seemeth that tithes appropriate by the statute of *31 H. 8. cap. 7.* are in "demesne," for they are tangible and visible; also the esplees, as alleged in a writ of right of advowson *de advocacione ecclesiæ, vel decimarum*, are in taking of gross dismes, and small dismes, and in oblations, &c. and therefore not like to a reversion, suit, fealty, or such like, which things are not manorable. Another exception was taken, for that he in the reversion after a lease for years, did in pleading say, "by force whereof he was seised of the reversion of the tenements *ut de feodo*," where he should have said, *in dominico suo ut de feodo*; for he may have an assize, if the lessee for years be ejected; and of such things whereof a man may have an assize, he must say in his count counting, that he was seised *in dominico suo*; but if the reversion had depended upon an estate for life, then the count ought to be *ut supra*: to which the court did answer, that true it is, he might have said so, but yet the other form of pleading

is good enough too; for where a man hath made a lease for years, he may not with right meddle with the demesne, nor with the fruit thereof, but hath only the reversion, and things incident to it, as fealty; and the reversion cannot properly be said [to be] in "demesne," for demesne is properly said, where a man hath the thing in possession. *Plowd.* 191 a [*Wrotesley v. Adams*], where other books and authorities are vouched to prove it. In some cases, this word *cum* or *ut* are understood as similitude, and in some cases for matter in fact. *Kelle*, in 5 H. 7. 2 b. See in Dr. Cowell's Interpretation for the word "advowson;" a man that hath *advocationem*, or the advowson, it is as much as the defence and patrimony of the incumbent's title. *Selden's Hist. of Tithes*, 85. Advowson of the right of presentment to a church is a temporal inheritance. *Dr. & Stu. li. 2. cap. 26. fo. 111.*

§ 11. And note, that a man cannot have a more large\* or greater estate of inheritance than fee simple.

This case doth shew, that estate in fee-simple is the most great and ample estate which a man may have in inheritance, and therefore afterwards (sect. 293) when in any of our books, mention is made, that a man is seised in fee without more words, it shall be understood in fee simple, for it shall not be understood by this word "in fee" (fee tail) unless the word in "fee tail" be especially named, and this *propter excellentiam*; the like reason is in sect. 99, viz. Escuage, is either incertain or certain; incertain is *servicium militare*, certain is *servicium socæ*; and if a man speak generally of escuage, it shall be understood *secundum excellentiam* in common speech of the more excellent service, and this is of suit service for the defence of the realm, and not *de servicio socæ*. 6 Co. 19 b. [*Gregory's case*]; for a like construction in other cases see more of this point after in sect. 93.

§ 12. Also, purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of descent from any of his ancestors, or of his cousins, but by his own deed.

As in the beginning of this chapter mention is made of the purchasing lands and tenements, and the prescript or rule thereof is

taught, so after certain rules delivered concerning the course of descents, in the conclusion Littleton defineth what purchase is; whereby we may see, that the law doth otherwise understand the word "purchase" than the vulgar people do, who deem the thing only to be purchased, for which money or other recompence is paid.

And some also professing the law have conceived an opinion, that this word "purchase" must be understood, such a possession of lands in any man, to which lands he cometh by purchase or gift without recompence; so that always purchase is intended by title (1); for he saith, if a man hath lands by disseisin, this is no purchase, so he would have disseisin to be a third division. But the law hath disposed, so that all inheritances which men have, are either by purchase or by descent, *et non novit tertium*, and the lands which a man hath by disseisin, a man hath by his agreement, therefore within the definition (2). *Plowd.* 47 b [*Wimbish v. Tailbois.*]

A man seised of land, part by bargain and sale, and part by disseisin, and part without recompence, and part in remainder, doth convey them all by these words, "all his purchased lands," all shall pass. *Plowd.* 11 a [*Reniger v. Fogossa.*] The consequence of this division of purchase or descent, is diverse, and therefore diligently to be observed; as for example, by the statute made *anno* 6 R. 2. cap. 6, amongst other things it is enacted, that whensoever and wheresoever such ladies, daughters, or other women aforesaid, be ravished, and after such rape do consent to such ravishers, that as well the ravishers as such as be ravished, be from henceforth disabled to have or challenge any heritage, dower, or joint feoffment, after the death of their husbands and ancestors, and that incontinently in this case, the next of blood of those ravishers, or of them that be so ravished, to whom such heritage, dower, or joint feoffment ought to revert, remain, or fall, after the death of such ravisher, or her so ravished, shall have title incontinently, that is to say, after the rape, to enter upon the ravisher, or her that is so ravished, and their assigns, lands and tenements, in the same heritage, dower, or joint feoffment, and the same to hold in state of heritage. Upon

(1) A purchase is always intended by title, and most properly by some kind of conveyance, either for money or some other consideration, or freely of gift; for that is in law also a purchase. *Co. Lit.* 18 b.—*Ed.*

(2) But such as attain to lands by mere injury or wrong, as by disseisin, intrusion, abatement, usurpation, &c. cannot be said to come in by purchase, no more than robbery, burglaries, piracy, or the like, can justly be termed purchase. *Co. Lit.* 18 b.—*Ed.*

this statute it was holden by all the Justices, 5 E. 4. 6 a, that if a woman have issue a daughter, and after do consent to a ravisher, and the daughter do enter into the lands in fee simple, and after the mother have issue a son, that the daughter shall retain the lands for ever, and the son, though he be heir, shall not put her out, for her entry is given by a special law, and she was then *in rerum natura*, and thereof a purchaser. But if a woman seised of lands in fee simple, having issue two sons, do consent to a ravisher, the eldest son dieth without entry, leaving his wife *enceinte* with a son or daughter, and the youngest son doth enter, and after, the issue of the eldest son is born, in this case it is clear, that the eldest son shall devest the land from the uncle, for it might have vested in the ancestor (*scil.*) in his father, if he had not died, and therefore though the uncle be the first that did enter, yet he shall be adjudged by law to be in by descent, in which case the son of the eldest brother shall be heir after his birth. *Vide* 1 Co. 99 a [*in Shelley's case.*] And so the case is agreed in 9 H. 7. 25, if a lease be made to one for life, the remainder to the right heirs of J. S., if J. S. do die having a daughter, his wife *enceinte*, the daughter entereth, her claim is by purchase, and therefore that son born after, shall never devest it. But if a lease be made for life, the remainder to the right heirs of J. S. in fee, [J. S.] dieth leaving two sons, the eldest son dieth, his wife *enceinte* with a son or daughter, the tenant for life dieth, the younger son entereth, and afterwards the son of the eldest son is born, now it is clear also that the son of the eldest shall devest the land from the uncle. 1 Co. 99 a. If a man make a gift in tail of land in gavelkind to another, and to the heirs male of his body, and he have issue four sons, by descent the four sons claim, and therefore they shall inherit. But if a lease be made for life of lands in gavelkind, the remainder to the right heir of J. S., and if J. S. dieth leaving four sons, the eldest son in this case shall have the remainder only, for there may be but one right heir in case of purchase, and so is Ellerkar's opinion expressly in 9 H. 6. 241. If a man make a lease for life, the remainder to the right heir females of the body of J. S., J. S. hath issue a son and a daughter, and dieth, in this case the daughter shall not take the remainder, for she is not heir female to take by purchase; and yet it is plain, if a gift in tail be made to J. S. himself, and to the heirs female of his body begotten, J. S. dieth having issue a son and a daughter, the daughter shall have the lands by descent, and in *Brooke's Abridgment, tit. Done, 42*, it appeareth that Hare, Master

of the Rolls, did take the difference between a gift in possession to a man and his heirs females, and a lease for life, the remainder to the right heirs females of his body, for in case of remainder, as he saith, she must be heir in deed, or otherwise she shall never claim it by purchase. 1 Co. 103. [*Shelley's case.*] *Lambert's Customs of Kent*, 398, where he saith, if a remainder "to a right heir male" is a good name of purchase, but "to the next heir male" is no name of purchase, except it be by devise; and more of this matter, and the diversity, when a man shall be said to be in as a purchaser, or by descent, see *Plowd.* 56 b [*Wimbish v. Tailbois*,] and in 3 Co. 62 a [*Lincoln College's case*,] *et nota bene*, it also appeareth in this section, that some be ancestors to the heir, and some be cousins; so is Bracton, lib. 2. c. 31. fo. 67, *sciendum quod cognationum, sive parentelarum, aliæ sunt suprà, aliæ sunt infrà, aliæ ex transverso sive à latere: parentes vero, qui sunt suprà, dici poterunt antecessores, et parentes, sed qui mortui sunt, et hæredes antecedunt, i. cedunt ante, et hæredes cedunt eis sub, quasi succedunt.*

And this word "ancestor" in the common law, is understood as well of the immediate parents, as of those that are higher, as may appear by the statute of the 25 E. 3, *De natis ultra mare*; and so in statute of 6 R. 2. cap. 6, and by many others; but the civilians call ascendants up, until you come to the great grandfather, parents, and those above they term *majores*, which we aptly expound antecessors, for in the descendants of the like degrees they are called *posteriores*. It is also shewed in this place, that he that will make title as heir by descent, must derive his title from one, that is his cousin, for if there be no consanguinity of blood between him and his ancestor, he cannot be his heir; as from example, if the purchaser of lands in fee die without issue, the heir of the part of his father must be his heir, and if there be no such, in default of such issue, the heirs of the mother's side of the purchaser shall inherit; for the purchaser hath both a father and a mother, and therefore the one side and the other are the purchaser's cousins of his blood; but if there be no heir of the part of the father, or the part of the mother of the purchaser, in that case the cousins of the wife of the purchaser cannot inherit those purchased lands, for they all be strangers in blood to the purchaser. Also if the purchaser had issue, who had the land by descent, and from him also the land had descended to his issue, and so from issue to issue, till four or five descents, and the last issue had died without issue, there if the heir of the part of the father, or of the part of the mother of the first

purchaser, do fail, no heir of the part of any woman whom any of the issues had taken, shall have the land by descent; for they all be strangers to the blood of the first purchaser, and therefore their lineage shall be estranged unto the land; for such are but of alliance to the first purchaser, and not of his blood, and the land shall descend to the blood and not to the alliance without blood. *Plowd.* 447 a, [ *Clerc v. Brook*, ] 12 E. 4. 14 a. *Plowd.* 296. [ *Cavell v. Cuddington*. ] 49 Ass. pl. 4.

If a man purchase lands in fee, and dieth without issue, having heirs both of the part of his father, and also of his mother, the heir of the part of the father entereth, and dieth without any heir of the part of the father of the purchaser; in this case [the] lands shall not descend to the heirs of the part of the mother of the purchaser, because it is a maxim in the law that of all hereditaments in possession, he who will claim them as heir, must make himself heir to him who was last actually seised, and heir they cannot be without consanguinity and cousinage in blood, and between them there is no cousinage in blood. *Vide* 3 Co. 42 a. [ *Ratcliff's case*. ] 12 E. 4. 14. *Brooke Descents*, 38. *Lit. s. 3*.

#### LIB. I. CAP. II.—FEE TAIL.

§ 13. Tenant in fee tail is by force of the statute of Westm. 2. cap. 1, for, before the said statute, all inheritances were fee simple: for all the gifts which be specified in that statute were fee simple conditional at the common law, as appeareth by the rehearsal of the same statute. And now, by this statute, tenant in tail is in two manners, that is to say, tenant in tail general, and tenant in tail special.

§ 14. Tenant in tail general is, where lands or tenements are given to a man, and to his heirs of his body begotten. In this case it is said general tail, because whatsoever woman, that such tenant taketh to wife (if he hath many wives, and by every of them hath issue), yet every one of these issues by possibility may inherit the tenements by force of the gift, because that every such issue is of his body engendered.

§ 15. In the same manner it is, where lands or tenements are given to a woman, and to the heirs of her body; albeit that she

hath divers husbands, yet the issue, which she may have by every husband, may inherit as issue in tail by force of this gift; and therefore such gifts are called general tails.

§ 16. Tenant in tail special is, where lands or tenements are given to a man and to his wife, and to the heirs of their two bodies begotten. In this case, none shall inherit by force of this gift, but those that be engendered between them two. And it is called especial tail, because if the wife die, and he taketh another wife, and have issue, the issue of the second wife shall not inherit by force of this gift, nor also the issue of the second husband, if the first husband die.

The law of England doth consist of three parts, the common law, customs, and acts of parliament. 4 *Co. Pref. fo. 2 b.* *Dr. & Stu. li. 1. cap. 4. in fine.* *Cowell's Inst. li. 1. tit. 2 and 3.* Vide *Plowd. fo. 9 b.* and 243. *Ashe, his Epist. Ded. to the Annals of the Law, Fortesc. cap. 8.* And therefore the student of the laws of England must be no less diligent to learn the laws positive, or statute laws, and to apprehend the true sense and interpretation of them, than to understand the principles and maxims. And with what gravity statutes are made in England, see *Fortesc. cap. 18.* And in the *Preface to 9 Co. fo. 3 a*, you may read the threefold end of this great and honorable assembly of estates, and that this court, being the most supreme court of this realm, is a part of the frame of the common law, and in some cases doth proceed legally according to the ordinary course of the common law, as it appeareth in the 30 *E. 3. fo. 11.* Vide 11 *Co. 14 a.*

The statute is called by the name of Westminster 2, and was made anno 13 *E. 1. cap. 1*, and is so called because the king kept his parliament there; and for that cause the former statutes made in that king's reign, in anno 3 *E. 1*, are called Westminster the 1st, and not because the parliament was the first, or that this word "parliament" then first crept in, as some have supposed. 9 *Co. Pref. fo. 6 a.* And upon the same occasion it is, that divers other statutes have their appellations from the place where the parliaments were holden and kept, as the statute of Merton, Marlebridge, Acton Burnell, stat. Eborac.

And the statute Westm. 2. cap. 3. was made at the suit, by the instant means of the Nobles, and Gentry of the Realm, and there-



fore may be termed *Gentilium municipale*, *Cucylles*, 75. But it is a maxim in policy, and a trial by experience, that the alteration of any fundamental point of the ancient common laws, and customs of this realm, is most dangerous; for that which hath been refined and perfected by all the wisest men in former successions of ages, and proved, and approved by continual experience, to be good and profitable to the commonwealth, cannot, without great hazard and danger, be altered. Infinite were the scruples, suits, and inconveniences, that this statute did introduce, which intended to give every man power to create a new-found estate tail, and to establish a perpetuity of his lands, so as the same should not be aliened nor let, but only during the life of the tenant in tail, which [was] against the fundamental rule of the common law, viz. that all estates of inheritance were fee simple; whereupon these inconveniences followed, purchasers defeated, creditors defrauded of their just and due debts, leases evicted, and other estates, made upon just and due considerations, were avoided, offenders emboldened to commit capital offences, and many other inconveniences followed. 4 *Co. Pref. 2b. et vide 6 pt. fo. 9a. et fo. 40a.* And in Coke's Preface to his 9th part, *fo. 7. et seq.* he saith, it is very observable out of what root, the doubts and questions in law do grow, the most difficult whereof do spring out of acts of parliament, and that in two sorts; either when an ancient pillar of the common law is taken out of it, or when new remedies are added to it: by the first, arise dangers and difficulties; and by the second, the common law justly understood is not bettered, but in many cases so fettered, that it is very much weakened: take one example for both, in 5 *Edw. 3. fo. 14.* Sir William Herle, Chief Justice of the Common Pleas, saith, that the statute *de donis conditionalibus* was made in the reign of Edward the First, who was the most sage king that ever was; and in the 9 *E. 3. fo. 22*, he saith, that they were sage and wise men who made the statute; and the cause of the statute was, to save the heritage of the blood of them, to whom the gift was made, and yet that statute, shaking a main pillar of the law, which made all estates of inheritance fee simple, no wisdom could foresee such and so many mischiefs, as upon these fettered inheritances followed; for hereby was established general perpetuity by act of parliament, for all who had, or hereafter would make them, by force whereof, all the possessions in England in fact were intailed accordingly, which was the occasion and cause of the said and divers other mischiefs. *Vide 3 Co. Pref. 7a.* And here may arise questions, wherefore, by all

the time of three hundred years and more, and after the said mischiefs and inconveniencés found by experience, which the makers of the said new statute did not and could not then foresee, (for *rerum progressus ostendunt multa quæ in initio præcavere seu providere non possunt*), the said statute hath been suffered to continue in force even unto this day, for so much as *eodem modo quo quid constituetur, dissolvitur*; the answer is, it hath been attempted and endeavoured to be rescinded at divers parliaments, and divers bills exhibited accordingly, and which the Lord Coke saith he hath seen, but always they have been, for one pretence or other, rejected; but the truth was, that the Lords and Commons knowing their estates in tail were not to be forfeited for felony or treason, as all estates of inheritance were before the said act, (and principally in the time of *II. 3.* in the Barons' wars), and finding that they were not answerable for the debts, and incumbrances of their ancestors, nor the sales, alienations, or leases of their ancestors did bind them; for the lands which were intailed to their ancestors always did reject those bills. *6 Co. fo. 40 b.* [*in Sir A. Mildmay's case.*] Where it is said, that the Justices by law did find out a way and means for the inconveniences thereof, to cut off those estates tail. But *Nota*, reader; that the [recovery] (1) was not then first had, but was more ancient. *10 Co. 37 a. b.* [*in Mary Portington's case.*]

Littleton, in the beginning of this Chapter, doth briefly rehearse the statute, which maketh a new law in this case, and is the groundwork of all that followeth in the same Chapter. But the student may do well, before his further proceeding, to see and peruse the very statute itself at large, *melius est petere fontes quam sectare rivulos.* *8 Co. 116 b.* *10 Co. 41 a.* *Nemo enim aliquam partem recte intelligere possit, antequam totum iterum atque iterum perlegerit.* *3 Co. 59 b.*

In the reading of this and all other statutes, for the apprehending the purview, the preamble of the act is to be considered, which Dyer, Chief Justice of the Common Pleas, termeth, a key to open the minds of the makers of the act, and the mischief which they did intend to remedy (2); *Plowd. 369 a.* but note, this is not general. Also it is to be known, that the style or title of the act is not any

(1) On referring to the case in Coke's Reports, it will be seen, that this is the only single word which will supply the omission in this place.—Ed.

(2) See *Co. Lit. 79 a.*—Ed.

parcel of the act of parliament; and divers acts be of greater extent than the title is. *Vide* 11 Co. 33 a, b. [in *Powtler's case*.] But you shall not find the word "intayle" in that statute, though after, in another statute, made in the same parliament, cap. 4. the very word "fee-tayle" is named. *Plowd.* 251 b. [in *Willion v. Berkley*.] And that name was given upon the certainty of the inheritance, as Littleton saith (sect. 18), for he saith, that, *talliare idem est quod certitudinem ponere*, and because in the gift it is expressed of whose body the heir, who shall inherit, shall issue, therefore he saith it was called "tayle." And the opinion of Dyer, Chief Justice of the Common Pleas, was, that it might take that name from the French word *tailer*, that is, to cut, *car a tailler bois*, is to cut wood, and because the estate is divided, docked, or cut off; for, before it was fee simple, and now by that statute the fee simple is cut off, and the estate thereby is divided, docked, cut off, or made less; it may be termed "estate-tail," that is to say, estate cut or made less(1). *Plowd.* 251 b. It appeareth, by the preamble to this statute, that the makers thereof had full and perfect consideration what the common law was in this point, before the framing of this new law, which is a necessary observation for all parliament-men, to whom the making of acts of parliament are committed: the neglect whereof is many times great occasion of multiplicity of suits and contentions. 4 Co. Pref. And because divers statutes are penned briefly, without such declaratory preamble, the student of the law must first diligently inquire, what the common law was in those cases, before he can sufficiently understand the true sense and sentence of the said statute. *Vide of this matter in Plowd.* 235 a. [in *Willion v. Berkley*], and in 8 Co. 70. *Nota*, four things are to be discerned, and considered, for the sure and true interpretation of all statutes, *Non in legendo sed in intelligendo leges consistunt*: therefore Stamford, in his Preface to the Pleas of the Crown, saith, *Citavi etiam non pauca de Bractono et Brittono, vetustis legum scriptoribus, hoc nimirum consilio, ut cum leges Coronæ, magnæ ex parte jure statutorio constant, ponatur ante legentis oculos commune jus, quod fuit ante ea statuta condita. Nam ea res maximè conducit recte interpretandis statutis. Id enim intelligenti, statim occurrunt mala, quæ commune jus contraxit. Pervidet autem ille, quæ illorum malorum parti medetur, et quæ non, et sit ne hujus-*

(1) See Co. Lit. 18 b. and 22 a.—Ed.

*modi statutum, nonatum jus per se; an nihil aliquid quam communis juris affirmatio. Quæ omnia nisi tenuerit interpretator statuti fallatur interpretando statuto, nec habebit ubi consistat, eo quod minus respicit materiam, unde emanat statutum. Ad hæc, pulcrum duxi perscrutari antiquitates, et præcepta, quæ ex principiis nascuntur. Nam qui refert se ad principia, is perspicit artium causas, ac certam et firmam notitiam habet, quæ neque everti, neque falli ullo modo potest.* Read Coke's Preface to his Fourth Book, concerning making new laws, six things, amongst others, do principally fall into consideration.

In the beginning of this Chapter Littleton teacheth, that before this statute of Westm. 2. cap. 1. there was but one statute of inheritance, and that was fee simple; but the estate fee simple was in two sorts or manners; the one fee simple absolute; the other conditional; whereof read at large in *Plowd.* 235 a. *et seq.* [ *Willion v. Berkley* ], and in 7 Co. 13 b. and in 9 Co. [ *Beaumont's case* ] 140 a. *Plowd.* 562 a. [ *Walsingham's case.* ]

This statute hath ordained *quod voluntas donatoris secundum formam doni sui manifeste expressa de cætero observetur*. And so the observation of the will of the donor, is made to be the reformation of all that, which then was thought to be amiss. And so the will of the giver is all the effect of the statute: and therefore it followeth, that the alienation of the donor shall not bind the issues, nor the donor; nor the second husband shall be the tenant by the curtesy; nor the issue of him and the wife, shall not inherit; so that the expressing of them in the statute is but superfluous; for the clauses are but consequent to the first purview, and are included in the first purview, for *voluntas donatoris* doth include them, and many others; for the second wife shall not be endowed; nor the donee cannot charge the land with a rent-charge, or other incumbrances; neither shall he forfeit the land for felony, nor other acts may he do to the disinheritance of the issues. And all this is intended in the first clause or purview; that is to say, *voluntas donatoris observetur*, for these acts are against his will, and every thing which is his will is reformed by this act, and every thing which is his will is made law by the statute. *Plowd.* 247 b. *et seq.* [ *Willion v. Berkley.* ]

Although the statute do say, *quod voluntas donatoris secundum formam in chartâ doni sui manifeste expressa de cætero observetur*;

(1) See ante, page 5.—Ed.

yet Littleton in this section saith, that every gift in tail within the statute *de donis conditionalibus*, before the making of the said statute, was fee simple at the common law; whereby we learn that the statute *de donis conditionalibus* was a nurse, and no mother of estates of inheritance tailed; in that it doth preserve estates of inheritance tailed, but doth not engender or procreate any estates tailed, which were not fee simple conditional before; and therefore the law is clear, that if lands be given to a man *et semini suo*, or *liberis suis de corpore*, or *prolibus suis*, or *exitibus suis*, or *pueris suis de corpore*, in these cases the donee hath no estate in fee tail, but only one estate for term of life, for if such gifts had been made before the statute, those words would not have made an estate in fee simple conditional, for want of the words "his heirs," and therefore, by Mr. Littleton's rule, no estate tail by the statute *de donis conditionalibus*, for the statute doth not create any new inheritance at the common law. 1 Co. 103 b. [*Shelley's case*.] And therefore if a lease be made for life, the remainder to the heirs males of the body of J. S., in this case, if I. S. having issue two sons, and his eldest son, having issue a daughter, dieth in the life of I. S., and then I. S. dieth; in this case the youngest son of I. S. after his death cannot take the fee simple conditional by the common law; for he was not heir male of the body to take the fee simple by purchase; for first he must be heir, and secondly he must be heir male; and therefore, if I. S. had been attainted of treason or felony, the heir male of his body should never take the remainder, for he was not heir. And in 12 Edw. 3. tit. 1 variance, 77, where a man made a gift to the husband and the wife, and to the heirs of the body of the husband, and if the husband and the wife die without issue of their two bodies, that then it shall remain over; in this case, although the will of the donor do appear, that the wife shall be also donee in the special tail; yet for so much as by the order of the common law [she] cannot have any estate in fee simple conditional, therefore she cannot have an estate tail by the statute; but in the former case, where lands be given to a man and to his heirs females of his body, here is an estate of inheritance vested in the donee, the which estate of inheritance the statute *de donis conditionalibus* doth direct to the heirs females by descent, notwithstanding there must be an issue male. 1 Co. 103 b. *et seq.* [*Shelley's case*] and 7 Co. *Nota bene*, the statute *de donis conditionalibus* doth not create estate tail, but of such estates as were fee simple conditional, and descendible in such form as now by the statute the lands shall descend.

§ 17. In the same manner it is, where tenements are given by one man to another, with a wife (which is the daughter or cousin to the giver) in frank-marriage, the which gift hath an inheritance by these words (frank-marriage) annexed unto it, although it be not expressly said or rehearsed in the gift (that is to say) that the donees shall have the tenements to them and to their heirs between them two begotten. And this is called especial tail, because the issue of the second wife may not inherit.

A gift in frank-marriage was at the common law before this statute *de donis conditionalibus*, and was in especial an estate of inheritance in the donee, as by the same statute may appear; and *Bracton*, li. 2. c. 7. fo. 25. But *post prolem suscitata*, they might alien their lands to the disinherison of their issues, of the donor in reversion, as the other donees upon condition might do. And this especial estate of inheritance might be framed by the order of the common law, without these prescript words (his heirs), and for that cause an estate in tail special was made by the only word "frank-marriage," without other essential words of inheritance: and this was for favor which the law had unto women, and unto their advancements by marriage; for beside this case, and that other, of gifts made in frank-almoigne, which the law intended was for the advancement of divine service, no estate of inheritance might pass without these words (and his heirs.) *Vide ante, fol. 7 b, in fine.*

*Note, in Dyer, 272 b.* Lands may be given by frank-marriage, as well after marriage as before, because the marriage may be intended to be the cause. *Vide Perkins, 48 b. [s. 237.] \**

Also note the intendment of the law of frank-marriage, which is well with a cousin, as with a daughter of the donor, for advancement. *Dyer, 287 a, and note 45 E. 3, 20, and in Coke's 9 part 14, [in Dowman's case] a gift in frank-marriage with his sister; read this case and Coke's 10 part 118 a [Cheyney's case.]*

§ 18. And note, that this word (*talliare*) is the same as to set to some certainty, or to limit to some certain inheritance. And for that it is limited and put in certain, what issue shall inherit by force

of such gifts, and how long the inheritance shall endure, it is called in Latin, *feodum talliatum*, i. e. *hæreditas in quandam certitudinem limitata*. For if tenant in general tail dieth without issue, the donor or his heirs may enter as in their reversion.

Concerning the derivation of this verb (*talliare*), here appeareth, and in *Plowd.* 251 a [*in Willion v. Berkley*.] But at the end of this section Littleton saith, if the tenant in tail die without issue, the donor or his heirs may enter, as in their reversion. But here must be excepted the interest of dower, or of tenancy by the curtesy, which the common law did give in all cases of inheritance, whereof the issue between, by possibility, might inherit, although it hath happened *de facto*, that one of the parties, so of such estate seised, died without issue of his body; for the having of issue doth not make the estate tail but the gift. 1 Co. 84 b [*Corbet's case*.] *Plowd.* 233 [*Willion v. Berkley*]. For the judges have conceived, that the statute itself, and the makers thereof, had no other meaning or intent. *Perkins*, 63. *Dr. & Stu.* 49. *Bracton*, lib. 2. fo. 92 b. *Quia pura est donatio ab initio, et purum feoffamentum, quamvis per conditionem tacitam vel expressam, dissolutum*; and according *nota* 8 Co. 34 (1), although the estate of inheritance, out of which such interest was derived, be determined; for it is tacitly implied in the gift, and the rule hath no place in this case, *cessante statu primitivo cessat derivativum*; for this is one of the four incidents to an estate tail, which inseparable incidents, by the law annexed, cannot be prohibited. 6 Co. 41 a [*Sir A. Midmay's case*], and *note Fitz. N. B.* 149. 12 E. 4. 2 b. For the ending of this section, I will only shew what is the definition of this word (reversion); it [is] a noun substantive made of the verb *reverter*, so that *reversio terræ* is, in English, *the returning of the land*, which is, as much in sense, *as the land returning*, as the Lord Dyer defined it. *Plowd.* 196 b. 158 b.

§ 19. In the same manner it is of the tenant in especial tail, &c. For in every gift in tail without more saying, the reversion of the

fee simple is in the donor. And the donees and their issues shall do to the donor, and to his heirs, the like services as the donor doth to his lord next paramount, except the donees in frank-marriage, who shall hold quietly from all manner of service (unless it be for fealty) until the fourth degree is past; and after the fourth degree is past, the issue in the fifth degree, and so forth the other issues after him, shall hold of the donor or of his heirs as they hold over, as before is said.

The reversion of the fee simple of every gift in tail is in the donor: in 5 H. 7. 14, Townsend said, that at the common law the tenant in tail had fee simple, and that estate doth continue after the statute, for the stat. Westm. 2, cap. 1, doth restrain nothing but the alienation, and that the issue shall have formedon; whereas at the common law he had no remedy. But by the rule of all the court after the making of this statute, tenant in tail hath but a fee tail, and not a fee simple. But the donor doth retain the fee-simple, and two fee simples cannot be of [one] land, and the donor may give or forfeit his fee-simple. *Bro. Estates*, 40; for reasonable creatures, who had the construction of the statute, immediately after the statute, did divide their estates upon reason, in the execution of the will of the donor. For when the statute had ordained, *quod voluntas donatoris observetur*, the consequence is, that the donee is restrained to alien lawfully the fee simple, or to do other acts which tenant in fee simple might do. And because he was restrained to do such lawful acts of fee simple, or to intermeddle with the fee simple, they took the intent of the makers of the statute, and of the donor, to be, that the donee had no fee simple, for it should be in vain to judge the fee simple in him, when he could do nothing lawfully with it. And therefore upon this reason they took it, that the fee simple was left in the donor, and yet nevertheless that the estate of the donee was an estate of inheritance, because the heirs of his body shall inherit it. But this inheritance cannot be a fee simple, for then there should be two fee simples of one land, but they took it to be a more base estate of inheritance, and called it fee tail, which is an estate of inheritance limited in certainty; and so upon good reason, in performance of the will of the donor, and of the makers of the statute also, they conceived [by] the purview that the estate was divided, and



that the donee had an estate tail, and the donor a fee simple, which he may grant over to another, and may grant it over by way of remainder, which before the statute he might not do, for then it was a fee simple in the donee. *Plowd.* 247 *b*, *et seq.* [*in Willion v. Berkley.*]

And *vide in 3 Co. fo. 3 b*, that he, who hath a remainder expectant upon an estate tail, shall have a writ of error upon a judgment given against the tenant in tail, though there was no such remainder at the common law; for when the statute *de donis conditionalibus* had enabled the donor to limit a remainder upon an estate tail, all actions which the common law did give to privies in estate, be by the same statute, as incidents, *tacitè*, given also, according to the rule of the common law; and therefore as those in remainder expectant upon an estate for life, or they in reversion, shall have a writ of error by the common law, of a judgment given against the tenant for life though they were not made parties by aid prayer, voucher, or receipt; so after the statute *de donis conditionalibus*, shall he have, that is in reversion or remainder expectant upon an estate tail; and note in *Co. ibid.* 4 *a. b.*

Also it is here thought, that the donees and their issues shall do unto the donor and his heirs, the like services, which the donor doth unto his lord next above him. So there is a tenure created between the donor and the donee. *Vide 10 Co. 108 b (1)*, and in 2 *E. 4. 5 b*, Danby, Justice, said unto a Serjeant, "Will you make a question whether tenant in tail shall be tenant unto the lord paramount, or unto the donor, *quasi deceret*, it is no question but that he holdeth of the donor, although this word be in the gift, *tenendum de capitalibus dominis*."

It hath been adjudged where the tenant that holdeth of the king *in capite* in chivalry, maketh a gift in tail, and [the donee (2)] dieth, the king shall not have the wardship of the heir of the donee of this land, but the donor shall have it. 4 *H. 6. 19. Plowd.* 249 *a, et seq. (3)*. *Vide Fitz. N. B.* 143, *b*; and in *Keilway*, 124 *a*, it is said, if I be seised of lands in fee simple, the which is holden of another man by knight's service, and 10s. rent, and after I do make a gift in tail, and do reserve no service, now the donee shall pay unto me such service as I pay over. In this case, if the

(1) *Lofield's case.*—*Ed.*

(2) The insertion of these words is necessary.—*Ed.*

(3) In *Willion v. Berkley.*—*Ed.*

lord do release unto me all manner of services, the services which were due unto me upon the gift, nevertheless shall not be extinct; and yet the service which the donee doth pay unto me, was by reason of the services which I do pay over; and the reason is, because my donee is an estranger unto the release made unto me by the lord, and also the service, due by reason of the gift in tail, be not parcel of the ancient service, but is merely a new tenure, between the donee and the donor, and so it is no reason that by the release made unto the donor, the seignory between the donee and the donor shall be extinct. The same law is, where the heir doth endow his mother, although the lord do release unto the heir, yet the heir shall have the service, of tenant in dower, as he had before the release. But if a man give land in tail, reserving unto himself certain rent, *et faciendo capitalibus dominis feodi servicia debita et consueta*, in this case the donee shall hold of the donor by the services by him reserved, and also he shall pay unto the lord the services which the donor ought to pay (scil.) such service as may be paid by another's hand, as rent, but homage or fealty he shall not pay unto the lord, because it cannot be done *per auter main*; and if the donee will not pay, then the donor may distrain for the rent, &c. And in this case, if the lord do release unto the donor all the services due unto him, the donee shall have advantage of it, because he himself is chargeable for the services which he released.

A man doth hold by knight's service, and at this day doth make a gift in tail, reserving to him and his heirs 10s. without other words, and the donee shall hold by knight's service and by 10s., by both, for one of them the law did reserve (scil.) the tenure by knight's service without any speech; and the 10s. is added to it by special reservation of the party. *Dyer, 52 a. b.*

And that is one reason wherefore no intail can be of copyhold lands, and that the statute *de donis conditionalibus*, doth not extend to it; for if that statute should alter the estate in the lands, and so create an estate of inheritance, (whereas by the judgment of law the estate of a copyholder is but *ad voluntatem domini secundum consuetudinem manerii*, thereby also the tenure should be altered, which would be prejudicial to the lord; for of necessity the donee in tail of lands must hold without special reservation, as the donor doth unto his lord.—3 Co. 9 a. (1).

Now for the same cause it is, if the tenant in tail be with the reversion expectant to him, and to his heirs, of land holden by service of chivalry of a common person, and after he dieth, his heir within age, although he shall be in wardship for his body, yet the lord shall not have the wardship of his lands, for the reversion was only immediately held of him, and not the estate tail; and if he grant over the reversion, he shall hold the estate tail of his grantee. And although the seignory of the estate tail be suspended, yet the donee hath two distinct estates in himself, (scil.) the estate tail and the reversion in fee; and the reversion is as a mesnalty between the lord and the donee in tail; nevertheless it may not be said in this case, and other like, that the lord may so be defeated of the wardship of the land, for so much as the law doth not give in such cases any wardship of the lands unto the lord, and the law doth wrong to none.—2 Co. 92. (1). And note there a special case where the donee shall hold of none.—*Dyer*, 154 b, *in fine*. *Nota, dicitur pro lege, tempore H. 8*, that a gift in frank-marriage, the remainder to John at Nokes in fee, is not good; for warranty and acquittal is incident to frank-marriage, *ratione* of the reversion in the donor, which cannot be where the donor doth put the remainder and fee to a stranger, upon the same gift.—*Bro. Frank-marriage*, 11. But a gift in frank-marriage, the remainder in tail to a stranger, is a good frank-marriage; for the reversion of the fee is in the donor, which maketh a tenure between them.—17 E. 3. 65.—*Finch*, 33. The second diversity hitherto shewed between a gift in frank-marriage, and all other gifts in tail, is, that the donee shall hold freely and discharged of all manner of services, due for the tenure of the said lands, except fealty; for if a man be seised in fee of lands holden of J., at S., by fealty and rent, and doth give it in frank-marriage unto me with his daughter, the father shall pay the [rent] yearly, until the fourth degree be past, and shall have nothing of the donees for it; but he shall have the rent of every other donee; and the reason is, because it was given with his daughter in frank-marriage, by which it is intended, that the daughter is advanced, and therefore the father shall pay the rent; and so, for the advancement of the daughter, the father shall bear the charge, by a maxim of the common law; and so the charge is translated from the daughter to the father; and the consideration thereof is nature, for the land was given unto the husband in marriage with his wife,

by the which acceptance, the husband taketh upon him to find his wife all necessities, and in consideration thereof, the father shall bear the charge of the rent, because the daughter is provided of livelihood, by the land given to him in marriage.—*Plowd.* 305 a. (1). Also the name which the law hath given to this especial kind of estate tail, doth notify so much, (scil.) frank-marriage.

Note, by Martin, Justice, that where a man gives lands with his daughter in frank-marriage, reserving 20s. rent by year, this reservation is void, till the fourth degree be past, and then it is good, for it is contrary to the nature of the tenure, which is to hold free and quit, &c.—4 H. 6. 22. and 26 Ass. p. 66, by Riche.—*Vide Bro. tit. Frank-marriage*, 9, out of the old Tenures.—*Finch*, 6a. (2). But if lands be given in frank-marriage *absque aliquo inde reddendo*, yet the donee shall hold by fealty, as appeareth, and reason hereof is alleged, (section 138,) it should be inconvenient and against reason, that a man should be tenant of estate of inheritance to another, and yet the lord should have no manner of service of him. in 10 Co. 117 b, 118 a.

And concerning how long, and by how many descents, this gift in frank-marriage shall continue exonerated, thus writeth Bracton, li. 2. fo. 21. *Liberum marritagium dicitur ubi donator vult quod terra sic data quieta sit, et libera ab omni seculari servitio, quod ad dominum feodi possit pertinere, et ita quod ille, cui sic data fuerit, nullum omnino faciat inde servitium, usque ad tertium hæredem, et usque ad quartum gradum, ita quod tertius hæres sit inclusivus.*—*Fleta*, li. 3.—*Brooke, tit. Frank-marriage*, 6. Nota, that the third heir in frank-marriage shall do homage and services, and not before; *et concordat*, 6 H. 3, and before that they shall do but fealty only: but by Littleton it appeareth that the fourth degree must be passed first, and the third heir is the very fourth degree, for the donees, who are not heirs, are the first degree; *tit. Droit, in Fitz.* 60.—15 H. 3, and 45 E. 3. 20 a, and the old Tenures doth agree with Littleton.—*Bro. Frank-marriage*, 9, *et judicia posteriora sunt in lege fortiora.*—8 Co. 97 a. And concerning degrees you may observe, that in gifts in frank-marriage, they are limited till the fourth degree be past; but to inherit lands by descent no limitation is, as appeareth, section 2; and so in *Plowden*, 425 a. (3), challenge to

(1) *Sharington v. Strotton.*—Ed.

(2) See Co. Lit. 23 a.—Ed.

(3) *Vernon v. Manners.*—Ed.

the array of a jury returned by the sheriff allowed, because the sheriff was cousin unto one of the parties to the suit, though the consanguinity was beyond the degrees of marriage,

If a man do hold of me by homage, fealty, and 20s. [rent,] the tenant doth make a gift in frank-marriage of the same land with his sister, and after the donee in the fourth degree taketh a wife, and hath issue, and dieth; his issue entereth and endoweth his mother of the possession of his father; the question [is,] if the mother shall pay the third part of the rent to the heir, as he doth pay over to the donor, or whether she shall hold her third part discharged during her life; and it was argued by the common grounds, that she shall hold it discharged, as of the best possession of her husband; but the opinion of Keble was, that she shall pay the third part of the rent unto the heir; for the land was bound with that condition at the beginning, (scil.) when the fourth degree was past, that then the donor and his heirs shall have such services, as he shall pay over, which condition doth precede the wife; and then it is reasonable, for so much as the heir is chargeable by the course of the common law, and not by his own act, nor by the act of her husband, that she shall be contributory to the heir: as if I give lands to a man in tail, reserving during the life of the donee 1*l.*, and after 20*s.*, in this case, if the donee die, and the issue enter, and endow his mother, she shall be contributory to the third part of 20*s.*—*Keilw.* 124*a.*

§ 20. And the degrees in frank-marriage shall be accounted in this manner, viz. from the donor to the donees in frank-marriage the first degree, because the wife that is one of the donees ought to be daughter, sister, or other cousin to the donor. And from the donees unto their issue shall be accounted the second degree, and from their issue unto their issue the third degree, and so forth. And the reason is, because that, after every such gift, the issues of the donor, and the issues of the donees after the fourth degree past of both parties in such form to be accounted, may, by the law of the holy church, intermarry. And that the donee in frank-marriage shall be said to be the first degree of the four degrees, a man may see in a plea upon a writ of right of ward, P. 31 E. 3, where the pl. pleadeth that his great-grandfather was seised of certain lands, &c. and held the same of another by knight's ser-

vice, &c. who gave the land to one Ralphe Holland with his sister in frank-marriage, &c.

In this place also briefly are touched divers other things of observation, touching the statute of frank-marriage. First, that the gift must be made with a woman, and for her advancement in marriage, and so *tempore H. 8. dictum fuit pro lege. Bro. Frank-marriage*, 10, that land cannot be given in frank-marriage with a man who is cousin to the donor. So a woman shall have a writ *causa matrimonii prælocuti*, but a man in that case shall not.—*Fitz. N. B.* 205 *a*, and *Plowd.* 58 *a*. (1). Secondly, [it is] in this case taught, that the donee in frank-marriage must be of the blood, and cousin to the donor, viz. daughter, sister, or other cousin, for if lands be given in frank-marriage with a woman, who is not of the blood, or cousin to the donor, this is but an estate for term of life, for it is out of the maxim, which maxim only maketh the estate of inheritance in this case.—*Bro. Frank-marriage*, 9, *out of old Tenures*; but whether a gift in frank-marriage to the mother, or other woman of the blood of the donor, in the line ascending, be good, it is not expressed here, therefore *quære. Perkins, fo.* [48, *s.* 236,] seemeth to be of opinion, that the donee in frank-marriage must be of the whole blood to the donor, but that conceit I have heard learned [men] deny.

Littleton, for proof of that he hath affirmed, concerning the degrees in frank-marriage, saith, the cause thereof is, for so much as after any such gift, the issues which do come from the donor, and the issues descending from the donees, after the fourth degree past on both parts, in such form to be accounted, may, by the law of the holy church, intermarry; for he did know that nothing is ordained by our law, contrary to nature, or contrary to reason, or contrary to the law of God.—*Plowd.* 304 *b*. (2). And in regard thereof, our law hath devoutly inclined to the canons and constitutions of the church in many cases, and so sections 202 and 400, and in 3 *Co.* 39 and 40. (3). Concerning the degrees of marriage prohibited, thus saith Plowden, “God in the Old Testament did prohibit marriage within the Levitical Degrees, which was done for no other consideration but to increase love; for God, who knoweth the nature and affections of men best, did see, that love by nature was

(1) *Wimbish v. Tailbois*.—*Ed.*(2) *Sharington v. Strotton*.—*Ed.*(3) *Ratcliff's case*.—*Ed.*

planted between cousins, and those of proximity of blood, and desiring to enlarge it further, did prohibit certain degrees, within which it was not permitted for any to marry, to the intent that they should marry in other cases, and thereby bind those lineages in love, and so love should be increased, whereof beyond all other things God desireth the increase; the which he made upon divine policy, for this love was planted by nature amongst those that are next of blood, and there was no need to make that more greater than nature had made it; but to marry elsewhere did engender other love in other families, and so did increase love, and by the laws of the holy church the degrees of marriage further were prohibited for the cause aforesaid."—*Plowd.* 306 b. (1). But (2) because *mater ecclesiæ* in this case did err, it was provided by the statute 32 H. 8. [c. 38.] to this effect, that all and every such marriage, as within this church of England shall be contracted between lawful persons, as by this act, we declare all persons to be lawful, that be not prohibited by God's law to marry, shall be good, and that no reservation or prohibition (God's law excepted) shall trouble or impeach any marriage without the Levitical Degrees. See more, concerning marriage, post, sect. 35, fo. 26. *hic*.

And to end this section, upon occasion that Littleton doth vouch the book case P. 31 E. 3. to prove his assertion, all this Treatise being made for the instruction of young students, I cannot but write that commendation of [it], which is attributed to that learned age by Sir William Thirning, anno 12 of the reign of King H. 4. 13 b, scil.; that they [were the] most sages of the law that ever was, in the reign of King Edward 3; which is cited in the Preface to 8 Co. fo. 6 a, and in his 10th book, 37 b. And therefore it is good counsel which Coke giveth in his Preface to his 1st book in these words:—"To the reader my advice is, that in the reading of these or any new Reports, he neglect not in any case the reading of the old book of years, reported in former ages, for assuredly out of the old fields must spring and grow the new corn."

§ 21. And all these entails aforesaid be specified in the said statute of Westm. 2. Also, there be divers other estates in tail, though they be not by express words specified in the said statute, but they are taken by the equity of the same statute. As if lands

(1) In *Sharrington v. Strotton*.—Ed.

(2) See Co. Lit. 24 a.—Ed.

be given to a man, and to his heirs males of his body begotten; in this case, his issue male shall inherit, and the issue female shall never inherit, and yet, in the other entails aforesaid, it is otherwise.

It appeareth before out of *Plowden's Commentaries*, 251 a, that *voluntas donatoris* is made a law concerning the creating of estates tail, and therefore tail unto the heirs males of the body of the donee, is within the provision of this statute, because they are within the will of the donor. For as Fleta, who made his book a long time past, said, in his third book, *modus legem dat donationi*, and Bracton, li. 2. cap. 6, *scient ampliari possunt hæredes, ita coarctari possunt, per modum donationis, modus enim legem dat donationi, et modus tenendus est contra jus commune, et contra legem, quia modus et conventio vincunt legem*. And it was thought reasonable, that *cujus est dare, ejus est disponere*. And the three estates limited in the preamble of this statute, (scil.) especial tail, frank-marriage, and general tail, are there put but for examples (1), and not as containing all tails, for the donor may make other tails by his limitation, for his will is the law as unto tails: as in the statute 27 H. 8. cap. 10, concerning jointures, although therein are expressed five forms particularly, yet all other estates, not therein expressed, are within the said act, for the said particular forms are put but for examples, and not to exclude any other estates, which are to the intent, and do agree with the intent of the makers of the act.—4 Co. 2 a. (2), and therefore in 15 H. 7. 10 b, Fyneux, Chief Justice, said, if lands be given to a man who is married, and to a woman who is married to another man, and to the heirs of their two bodies engendered, this is a good tail, because they may afterwards marry by possibility (3), (scil.) after the death of the wife of the husband, and husband of the wife, *quod Rede concessit*, and therefore they may be seised in tail presently by the gift. *Vide* such a conveyance made in *Chudleigh's case*, in 1 Co. 120 a: and in 10 Co. 50 b. (4), it is said by the Court, that this case is grounded upon necessity and upon common possibility, which is termed *potentia-propinqua*, for a possibility which doth depend upon the death of a man or a woman, hath a necessary and common intendment, (scil.) necessary, in respect that all the issues of Adam must die, *statutum est hominibus semel mori*, and common

(1) See Co. Lit. 24 a.—Ed.

(3) See Co. Lit. 25 b.—Ed.

(2) Vernon's case.—Ed.

(4) Lampet's case.—Ed.



that death may happen at such time as the contingency may take effect; and therefore in the case it is of necessity that death shall follow, and it is of common possibility that the one shall die before the other, so that marriage may ensue: but in the same case there may not be one possibility upon another; and therefore, if lands be given to a man and two women, and to the heirs of their bodies begotten, the law doth not intend, that first he shall marry one, and after that she whom he married shall die, and then he should marry with the other; and therefore, in such a case, they have several inheritances at the commencement (1).—*Vide 7 Co. fo. ultimo b. infinitum in jure reprobatur.* And also, if a gift be made to the father, and to his daughter, brother, and sister, mother, and son, and to the heirs of their two bodies engendered, they are joint tenants for lives, and have several inheritances, as in a gift made unto two men or two women.—7 H. [4.] 16.—44 E. 3. 13.

But Littleton in this place knew that the first case alleged, and divers other cases not expressed in the statute, are to be taken by the equity of the statute, and in *Plowd. Com.* 248, it is adjudged, that the king is bound by the said statute, although he be not expressly named in the same: and therefore if a gift in tail be made unto his highness, he shall not take a conditional estate in fee simple, but an estate in tail. So that if the king die without issue according to the limitation, it shall revert to the donor, and that by the equity of the said statute. If lands be given to one and to his heirs, and if the donee do die without heir of his body, that it shall remain unto another; this shall be a good tail by the equity of the statute. 5 H. 5. 6.—*Bro. Estates*, 62. *Tail*, 12; et 19 H. 6. 74, per *Vam-page*: which equity is well defined in *Plowd.* 467. (2). *Equitas est verborum legis directio efficacius, cum una res solummodo legis cavetur verbis, ut omnis alia in æquali genere eisdem caveatur verbis*, which doth agree with *Bracton*, lib. 1. cap. 3, *equitas est rerum convenientia, quæ in paribus causis paria desiderat jura, et omnia bene cœqui paret, et dicitur equitas, quasi equalitas*; for when by the words one thing is enacted, all other things also are enacted which be in like degrees; for the student must not stay upon the letter only, *nam qui hæret in literâ hæret in cortice.* But in the sense which equity doth temper or direct is the fruit; a nut hath a shell and a kernel, and so every statute hath letter and sense, and as of the nut, the kernel is the fruit, so of the statute the sense is

(1) See *Co. Lit.* 25 b.—*Ed.*(2) In *Eyston v. Studd.*—*Ed.*

[the] fruit; for when laws or statutes be made, yet there are some things which be excepted out of the provision of it, by law and reason, though they are not expressed by words.—*Plowd.* 13 b. (1), and *lex beneficius rei simili remedium præstat, odiosa autem casu, quo efficitur, ulterius non extendit.*—7 H. 6. 11.—5 Co. 77 (2).—*Plowd.* 36 b. (3). 53 b. 54 a. (4). 178 a. (5), 360 b. (6). But the opinion of Rede, 21 H. 7. [17.] is, and of Heust, in 18 H. 6. 16, that statutes, made in restraint or abridgment of the common law, shall not be taken by equity *stricti juris*. But this rule *non tenet in omnibus*, as in Plowden, in Wimbish and Tailbois' case, and in Plat's case may appear.

§22. In the same manner it is, if lands or tenements be given to a man and to his heirs female of his body begotten; in this case, his issue female shall inherit by force and form of the said gift, and not his issue male. For, in such cases of gifts in tail, the will of the donor ought to be observed, who ought to inherit, and who not.

§23. And in case where lands or tenements be given to a man, and to the heirs males of his body, and he hath issue two sons, and dieth, and the eldest son enter as heir male, and hath issue a daughter, and dieth, his brother shall have the land, and not the daughter, for that the brother is heir male. But otherwise it is in the other entails, which are specified in the said statute.

Littleton saith, if lands or tenements be given to a man and to his heirs males of his body, and he have issue two sons, [and] dieth; and the eldest son doth enter as heir male, and hath issue a daughter, and dieth; the brother shall have the land, and not the daughter, (although she be heir general) because the brother is heir male *secundum formam doni*; and [so] is the law in case the king do by his letters patent create a baron to him and to his heirs males of his body, who hath issue two sons, and dieth; the eldest son hath issue a daughter, and dieth; the dignity shall descend unto the uncle of the daughter, who was brother to her father, and [uncle] to her,

(1) *Reniger v. Fogossa*.—Ed.

(2) *Booth's case*.—Ed.

(3) *Platt v. Sheriff of London*.—Ed.

(4) *Wimbish v. Tailbois*.—Ed.

(5) *Hill v. Grange*.—Ed.

(6) *Stowel v. Lord Zouch*.—Ed.

though she did descend from heir male. But if an annuity be granted by like words of entail, and the donee hath issue two sons, and dieth, the eldest son hath issue a daughter, and dieth, the daughter shall inherit this annuity, and not the brother; for this is an estate in fee simple, to which she is heir general, and it is no estate tail, neither by express words, nor is so to be construed by the equity of the statute, which speaketh *de tenementis sic datis sub conditione*; but annuity is not lands nor tenements, so that no entail is hereof made in the said statute.—*Manxel's case*, fo. 3 a, in 1 *Plowd.*

And concerning this case of Littleton, a difference was taken in 1 Co. 102 b (1), when the heir male of the body doth claim by descent, and when by purchase; for in descent the law is as Littleton hath shewed, but otherwise it is in cases of purchase (2), which diversity is proved by the case in 37 H. 8, *tit. Done*, 42, in *Bro. Abr.* If a man do make a gift in tail, of lands in gavelkind to a man, and to his heirs males of his body, and he have four sons, in this case all the sons shall inherit. But if a lease for life be made of lands in gavelkind, the remainder to the right heirs of J. S. and J. S. dieth, having issue four sons, in this case the eldest son only shall have the remainder, for there must be but one right heir in case of purchase. *Vide Lambert's Kent*, 398; and so is Ellerker's opinion expressly in 9 H. 6. 24, if a man make a lease for life, the remainder unto the right heirs females of the body of J. S., and John-at-Stiles hath issue one son and a daughter, and dieth; in this case the daughter shall not take the remainder, for she is not heir female to take by purchase; and yet it is plain, if a gift in tail be made to J. S. himself, and to the heirs females of his body, and John-at-Stiles die, having issue a son and a daughter, the daughter shall have the land by descent; and in 37 H. 8, *tit. Done*, 61. *Bro. Abr.* it doth appear that Hare, Master of the Rolls, did take a difference between a gift in possession to a man, and to his heirs females of his body, and a lease for life, the remainder to the right heirs females of his body; for in case of remainder, he saith, she must be heir in fact, or otherwise she shall never claim it by purchase; but in the said case where lands be given unto a man, and to the heirs females of his body, here is an estate of inheritance vested in the donee, which estate of inheritance the statute *de donis conditionalibus* doth direct unto the heir female by descent.

(1) *Shelley's case*.—*Ed.*(2) See Co. Lit. 24 b.—*Ed.*

Or if copyhold land be surrendered to a man by words of entail general or special, he hath issue two sons, the eldest hath issue a daughter, and dieth, the daughter shall be heir, as unto a fee simple, which was in her father, for copyhold lands are out of the statute of Westm. 2. cap. 1. 3 Co. 8, *Heydon's case*.

§ 24. Also, if lands be given to a man and to the heirs male of his body, and he hath issue a daughter, who hath issue a son, and dieth, and after the donee die; in this case, the son of the daughter shall not inherit by force of the entail; because whosoever shall inherit by force of a gift in tail made to the heirs males, ought to convey his descent wholly by the heirs males. Also in this case the donor may enter, for that the donee is dead without issue male in the law, insomuch as the issue of the daughter cannot convey to himself the descent by an heir male.

This is the second case concerning good pleading which as yet hath lain in our way, wherein the rule is plain, and therewith doth agree divers authorities. 9 H. 6. 23 b. 20 H. 6. 13 b; wherein note by the way, although the estate in tail be made by the statute, yet the common law doth govern and direct the descent, according to her maxims and rules, *quia quod tacite intelligitur deesse non videtur*. Vide 4 Co. 22 a.

If lands be given unto a man and his wife in tail special, the husband is attainted of treason, and executed, the wife surviveth, yet after their death their issues are not inheritable, because in their lineal conveyance they must make themselves heir as well to the father as to the mother; *Dyer*, 332, which in this case he cannot do, because the blood is corrupted between the father and the son, by the attainder of the father. 5 H. 7. 33 a. But in 8 Co. 166 a, if there be grandfather, father, and son, and the grandfather be tenant in tail, and the father is attainted of high treason, and dieth in the life of the grandfather, and after the grandfather dieth, this land shall descend to the son, notwithstanding the attainder of the father, which case was affirmed for law *per totam curiam*, for the attainder is not any corruption of blood for lands intailed in this case. Vide 3 Co. 41. And upon the same reason is the statute of Magna Charta, cap. 33, expounded, viz. *nullus capiatur aut imprisonetur*

*propter appellum feminae de morte alterius quam viri sui*; for no more than a woman is permitted to have an appeal for the death of any of her ancestors or cousins, but in the case of her husband, no more shall any child of her's, or other cousin to the dead person, make any conveyance in the cousinage by a woman, although the person be a male person and not female, and notwithstanding that the woman by whom he maketh his conveyance, be dead, living him, for whose death the appeal is brought. \* 17 E. 4. 1. *Vide Stamf. P. C. l. 2. c. 7. See Poulton [de Pace] tit. Appeal, 150 b, et 151 a.* Note the diversity, between disabilities personal and temporary, and disabilities absolute and perpetual. 11 Co. 1 b (1).

§ 25. In the same manner it is, where lands are given to a man and his wife, and to the heirs males of their two bodies begotten, &c.

§ 26. Also, if tenements be given to a man and to his wife, and to the heirs of the body of the man, in this case the husband hath an estate in general tail, and the wife but an estate for term of life.

§ 27. Also, if lands be given to the husband and wife, and to the heirs of the husband which he shall beget on the body of his wife, in this case the husband hath an estate in especial tail, and the wife but an estate for term of life.

§ 28. And if the gift be made to the husband and to his wife, and to the heirs of the body of the wife by the husband begotten, there the wife hath an estate in special tail, and the husband but for term of life. But if lands be given to the husband and the wife, and to the heirs which the husband shall beget on the body of the wife, in this case both of them have an estate tail, because this word (heirs) is not limited to the one more than to the other.

§ 29. Also, if land be given to a man and to his heirs which he shall beget on the body of his wife, in this case the husband hath an estate in special tail, and the wife hath nothing.

§ 30. Also, if a man hath issue a son and dieth, and land is given to the son, and to the heirs of the body of his father begotten, this is a good entail, and yet the father was dead at the time of the gift.

And there be many other estates in the tail, by the equity of the said statute, which be not here specified.

All these cases be added to shew more proof that the statute Westm. 2, is to be taken by equity, and by construction of the said statute, to be estates in tail, although they are not expressed in plain words in the said statute; the ground and reason whereof is, because of those words in the statute *voluntas donatoris* in these estates tail *est observanda*; as before is declared, and by other cases also exemplified; and if the reader consider well these sections 26, 27, 28, and 29, and therewithal how one of the donees shall take but an estate for life, or no estate, by virtue of the conveyance, which peradventure is contrary to the true meaning and agreement of the parties, he may think how requisite it is for purchasers to take some advice and counsel in the making of their conveyances and assurances, of men learned in the law, and not to be over credulous in parsons, scriveners, or other priests. 2 Co. Pref. And especially concerning this manner of entail, made to the son after the death of his father, mentioned in the sect. 30, see more in sect. 353.

The exterior semblance of discordance of this case from the former, may peradventure trouble the young student, but it ariseth only by ignorance of the interior intelligence of the case, and of the reason and rule thereof; [for], for the most part, every particular case is hinged upon a particular cause. Vide 8 Co. 19. *Non in legendo sed [in] intelligendo leges consistunt.* 8 Co. 167. Therefore for the demonstration thereof I will vouch the book case from whence Littleton did ground his opinion; in 18 Ass. pl. 5, Thorpe said, it was adjudged in parliament, if a gift be made to one and to his heirs males, that his sisters and other heirs collateral, as well as the heirs males, shall be inheritable, because upon such a gift he hath a fee simple (1). Vide 8 Co. 22 a. and in 7 Co. 136 a. (2). Judgment is cited Hil. 38 Eliz. Rot. 739, in the King's Bench, between Abraham and Trigge, where a feoffment was made to the uses of certain indentures, and one limitation was *ad opus et usum Gabrielis Dormer, et hæredum masculorum suorum legitime procreatorum, et pro defectu talis exitus*, to the use of divers others in tail in remainder; and upon argument at the bar and the bench, it was adjudged, that Gabriel hath fee simple; for it is not limited of whose

(1) See Co. Lit. 27 b.—Ed.

(2) In Beresford's case.—Ed.

body the heirs male shall be engendered, but his meaning was *quod singuli hæredes sui masculi* should inherit, which intent doth not stand with the rule of the law, and therefore although a remainder was limited over, which cannot be upon a fee simple, yet this form of gift cannot, against the rules of the law, make words of fee simple to be converted to an estate tail, and therefore cannot be taken by equity of the statute *de donis conditionalibus*. And with this doth agree the book in 8 E. 3. 49, where lands were given to one *et hæredibus suis legitimis*, this is a fee simple, which cases are vouched in 7 Co. and 9 H. 6. 25, Paston said, that if lands be given to one and to his heirs males, or his heirs females, he hath fee simple *quod fuit concessum*, but if it be given to him and his heirs males or females of his body, then he hath a good tail. *Nota*, in Sir John Davies's Book, 34 b, *et seq*, that it is against the nature of fee simple to exclude the heir female, if heir male fail; and therefore if a feoffment be made to J. at S. and his heirs, proviso that his daughters shall not inherit, this is a void proviso; but Fitzherbert and Shelley did agree clearly, that if land be devised to a man and his heirs males, that the devisee shall have an estate tail, without any more words, for the law is favorable to all devises, and will and doth construe them according to the intent of the devisor, and therefore the devisee shall have an estate tail, but otherwise it is in a gift; and see the diversity, *quod nota*. 27 H. 8. 27 a, *Devise in Fitz.* But if the king doth give lands to John-at-Stile, *et hæredibus masculis suis*, it hath been adjudged by all the Judges in the Exchequer Chamber, that the grant is void, because the king is deceived in his grant; for it doth sound in fee simple, where (*ut videtur*) the king did but intend an estate tail, which is not so expressed, and therefore in this case he is but tenant at will, *et è contra in casu communis personæ*. *Casu Lovel*, 18 H. 8. *Bro. Patents*, 104. And Gerurd, Attorney-General of Queen Elizabeth, saith, about 18 H. 8, this case was in question for the manor of Bowerhall in Essex, the king did make a grant *de gratiâ speciali, certâ scientiâ, et mero motu suo*, and the opinion of the Justices was, that no estate of inheritance did pass; for the words will not make an estate tail, nor fee simple in the king's case, notwithstanding these words *ex gratiâ speciali et certâ scientiâ*, for his intent was, that the land should not go unto the heirs females of the patentee; and to make a new course of inheritance, he could not; *et certâ scientiâ* will not exclude the king, but that he may say there was no such course of inheritance as he did mean. *Plowd.* 335 a, *in the case of the Mines*,

which case is vouched in 1 Co. 46, et 49 a, in the case of *Alton Woods*.

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§ 31. But if a man give lands or tenements to another, to have and to hold to him and to his heirs males, or to his heirs females, he to whom such a gift is made hath a fee simple, because it is not limited by the gift, of what body the issue male or female shall be, and so it cannot in any wise be taken by the equity of the said statute, and therefore he hath a fee simple.

The case alleged, wherefore in this case no estate tail is granted is, because it is not limited by the gift, of what body the issue male or female shall issue; but Littleton's meaning herein was not that [in] the making of an estate tail, the limitation of whose body the issue should be begotten, is necessarily to be expressed, and is of like essential force, as the word "heirs" are for the creating of a fee simple, for he had seen the book in 5 H. 5. fo. 6, where a gift was *dedi unum messuagium R. et K. uxori ejus, et hæredibus eorum, et aliis hæredibus dicti R. si dicti hæredes de dictis R. et K. exeuntes obierint sine hæredibus de se*. In this case those words *de corpore* are omitted, and yet it was adjudged a good estate tail, for there be words which be tantamount. In H. 4. tit. Brief, land was given to one *et hæredibus quos sibi contigerit habere de uxore sua*, this is a good estate tail; and so if lands be given to one *et hæredibus de se exeuntibus*. Vide 7 Co. 137 (1). 8 Co. 27 a, and in 7 Co. *ubi supra*, it is said, that these words "lawfully begotten," are implied, for every heir must be lawfully engendered. But in Littleton's case, the words "heirs males or heirs females" be not restraining or limiting, of whose body in certainty such heirs shall issue, neither expressly nor by implication; for the donees may have heirs males or females that be collateral, and not heirs of his body.

And to conclude this chapter for the satisfaction of the reader, I will set down how far this statute *de donis conditionalibus* standeth in force at this day; for though by this law a main pillar and principle of the common law was taken away, for (*leges posteriores priores contrarias abrogant*) 1 Co. 25 b, yet because it did bring unto many men much freedom and immunity, the said statute hath been suffered to continue in force, and hath not been repealed by



the same authority by which it was made, as before appeareth, except in special cases forfeited to the king for treason: contrary to the provision of that statute was 26 H. 8. cap. 13; for if tenant in tail do commit felony, and is attainted, his intailed lands are not forfeited, but only during life, and that by virtue of the statute of Westm. 2. cap. 1, at this day in force, as unto that see before, *fo. 15, and in 6 Co. fo. 40 b*: the words of the act be, "(1), shall lose and forfeit to the king's highness, his heirs and successors, all such lands, tenements, and hereditaments, comprised in the same fine, in possession, reversion, remainder, or in use, any manner of estate tail should immediately after the said fine levied, ingrossed, and proclamation made, bind the right heir and heirs of such tenant in tail, and every other person or persons seised, or claiming to their use or uses, by occasion whereof divers debates, controversies, suits, and troubles have been begun, moved, and had within this realm, and more be like to ensue, if the remedy for the same be not provided; for the establishment and reformation whereof, and for the sure and sincere interpretation of the said statute, in avoiding all dangers, contentions, controversies, ambiguities, and doubts that hereafter may insurge, grow, or happen, our sovereign lord the king, with the assent of the lords spiritual and temporal, and the commons in this present parliament assembled, and by authority of the same, hath enacted and ordained; that all and singular fines, as well heretofore levied, as hereafter to be levied, before the said justices, with proclamation, according to the said statute, by any person or persons of full age of twenty-one years, of any manors, lands, tenements, or hereditaments, before the time of the same fine levied, in any wise intailed to the person or persons so levying the same fine, or to any the ancestor or ancestors of the same person or persons in possession, reversion, remainder, or in use, shall be immediately after the same fine levied, ingrossed, and proclamation made, adjudged, accepted, deemed and taken to all intents and purposes a sufficient bar and discharge for ever against the said person or persons and their heirs, claiming the said lands, tenements, and hereditaments, or any parcel thereof, only by force of any such entail, against all

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(1) The following quotation is printed *verbatim* from the MS.: the whole passage is so confused that I have not ventured to alter it; though I have little doubt that the transcriber has omitted several lines, (the error probably having arisen from the repetition of the words "lands, tenements,

and hereditaments,") and thus confounded the statutes 26 H. 8. c. 13, and 4 H. 7. c. 24, the Commentator probably having passed from the mention of the former to the latter statute, as he does at the end of the paragraph to the statute 33 H. 8. c. 39.—*Ed.*

other persons claiming the same, or any parcel thereof, only to their use, or the use of any manner of heir of the bodies of them, any ambiguity, doubt, or contrariety of opinion, risen or grown upon the said statute to the contrary notwithstanding ;" and if tenant in tail do make a lease for lives, in all points according to the statute, and after die without issue, this lease being derived out of the estate tail, shall not continue longer than the estate tail, for *cessante statu primitivo cessat derivativus*. 8 Co. 34 a. *quod fuit concessum per curiam*, contrary to the opinion in 33 H. 8, Dyer, 48. *Vide in Plowd.* 560 a.

Also, by the statute 33 H. 8. cap. 39, it is enacted, " that all manors, lands, &c. which now be, or which hereafter shall come, or be, in or to the possession or seisement of any person to whom the same manors, lands, &c. have heretofore or hereafter shall descend, &c. in fee simple or fee tail, &c. by or after the decease of any his or their ancestor or ancestors, as heir or by gift of his ancestor, whose heir he is, which said ancestor or ancestors was, is, or shall be, indebted to the king, or to any other person to his use, by judgment, recognizance, obligation, or other specialty, that then in every such case, the same manor, lands, &c. shall be and stand by authority of this act, from henceforth charged and chargeable, and for payment of the same debt;" and for the exposition of the said statute, and in what case the issue in tail is chargeable to the king for entailed lands descended, and in what [not], *nota in* 7 Co. 21. But in other cases the statute Westm. 2. cap. 1, is in force at this day. *Nota*, entailed lands are not forfeited by any attainder in *præmunire*, but only for the life of such tenant in tail, and his issue shall inherit, 11 Co. 63 b. Save only about two hundred years after the making of the statute, viz. 12 E. 4. 19, by the resolution of the Judges, it was resolved, that by a common recovery the estate tail may be barred, as a thing not contrary to the said statute, nor unto the intent of the donor; which construction they made for a remedy of manifold mischiefs which were introduced into the commonwealth by it. 3 Co. Pref. fo. 7, et 3 Co. 60 a, et 1 Co. 131 b. And one principal mischief was, the statute 13 E. 1, *de donis conditionalibus*, in a manner did create perpetuity, contrary to the order of the common law; for the policy of the law was, to give power *post prolem suscitata* to alien, and for two causes, the one that the estate of a purchaser should not be voided by a remote possibility (scil.), that the donee and his issue also should die without issue; secondly, if he having fee simple should not have

power after issue to alien, this should be in a manner a perpetuity, and a restraint of alienation for ever, which the common law for many causes would not permit. 7 Co. 35 a. And although it be objected in *Mary Portington's case*, in 10 Co. 37 a, that this was a new invention then first found out, you may read there, in the b side of the same leaf, this objection fully and at large answered: *et fo. 38 a, et ibid. 42 a*, it is well said, *quod novum judicium non dat jus novum, sed declarat antiquum, quia judicium est juris dictum, et per judicium jus est noviter revelatum quod din fuit velatum*. And true it is, that the law doth sometimes sleep, and a judgment doth awake it, for *dormit aliquando jus, moritur nunquam*. And for the settling of the mind and judgment of the reader concerning these common recoveries, used to cut off the entails, read *Doct. & Stu. lib. 1. cap. 27*. And at this day the law is made evident, that no perpetuities may be made by occasion or by colour of any proviso or intention of man, whereof read *Corbet's case*, in 1 Co. 85; and *Mildmay's case*, in 6 Co. 41 et 52, and *Mary Portington's case*, in 10 Co. 39. But there is a statute made in 34 H. 8. cap. 20, intituled, "An Act to bar feigned recoveries of land, whereof the king's majesty is in reversion;" which see, *ibid*.

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### LIB. I. CAP. III.—TENANT IN TAIL AFTER POSSIBILITY, &c.

§ 32. Tenant in tail after possibility of issue extinct is, where tenements are given to a man and to his wife in especial tail; if one of them die without issue, the survivor is tenant in tail after possibility of issue extinct. And if they have issue, and the one die, albeit that during the life of the issue, the survivor shall not be said tenant in tail after possibility of issue extinct; yet if the issue die without issue, so as there be not any issue alive which may inherit by force of the tail, then the surviving party of the donees is tenant in tail after possibility of issue extinct.

§ 33. Also, if tenements be given to a man and to his heirs which he shall beget on the body of his wife; in this case the wife has nothing in the tenements, and the husband is seised as donee in especial tail. And in this case, if the wife die without issue of her

body begotten by her husband, then the husband is tenant in tail after possibility of issue extinct.

§ 34. And note, that none can be tenant in tail after possibility of issue extinct, but one of the donees or donee in especial tail. For the donee in general tail cannot be said to be tenant in tail after possibility of issue extinct; because always during his life he may by possibility have issue which may inherit by force of the same entail. And so in the same manner the issue, which is heir to the donees in especial tail, cannot be tenant in tail after possibility of issue extinct, for the reason abovesaid.

And note, that tenant in tail after possibility of issue extinct, shall not be punished of waste, for the inheritance that once was in him, 10 H. 6. 1. But he in the reversion may enter if he alien in fee, 45 E. 3. 22.

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It appeareth in the precedent chapter, that tenant in tail hath an inheritance which by possibility may continue for ever, and that he hath power to bar the heirs and them in reversion or remainder, 10 Co. 44 a, by a recovery; for that is one of the four incidents to an estate tail, which inseparable incident by the law annexed unto an estate tail, cannot be prohibited or restrained by any condition, 6 Co. 41 a (1). And this estate of inheritance doth not commence by the having of issue, but in maintenance, before any issue, he hath an estate of inheritance. 50 E. 3. fo. 3 b. If a lease for term of life be made to J. at S. the remainder to J. at N. in tail, if J. at S. commit waste, J. at N. may have his action of waste, and that before he hath any issue; if he do recover his treble damages, &c. in the action, and have judgment, and die before execution, his executors shall therefore sue the execution, although the tenant in tail died before any issue had. And therefore also before issue, his feoffment is but a discontinuance, and no forfeiture: otherwise it is, if tenant for life do make a feoffment, for he in the reversion shall be received upon his default in a *præcipe*. 1 Co. 84 b (2). Nor the statute made 9 R. 2. cap. 3, which doth give error and attain to him in the reversion, during the life of tenant for life, doth not give any such remedy to him in the reversion ex-

(1) Sir A. Mildmay's case.—Ed.

(2) Corbet's case.—Ed.

pectant upon an estate in tail. 10 Co. 44 b. 3 Co. 4 b. (1). Neither shall he have a writ of *ad terminum qui præteriit*, if the donee die without issue, for the word "heirs" do make a greater estate than for life, and so was the common law before the statute of Westm. 2. cap. 1. *Plowd.* 241 b, *Lord Barkley's case*.

Neither is the possibility of having issue the cause of the estate of inheritance in tail, but the statute, which doth enact, *quod voluntas donatoris in donis conditionalibus in chartis suis manifeste expressa est observanda*, for if the donee or donees in tail be past the age *de enfanter*, yet they have an estate tail, and an inheritance, and by consequence have power to do and execute all things incident to such high estate. *Vide 1<sup>st</sup> H. 4. 2 b. Cokeyne*; and in 9 Co. 140 b, it is resolved, that any one may have an estate tail, and yet all the issues in tail be barred to inherit; *read the case*.

But when time hath disclosed, and made it manifest, by the death of one of the donees in tail special without issue, that there is no possibility to have issue, who may succeed in the inheritance, then the Judges have thought good, according to reason and justice, to transform that estate tail, and to metamorphose it, from an estate of inheritance, unto a particular estate for life only, for the avoiding of absurdity, and prejudice to him in the reversion; as the Judges did after the statute *de donis conditionalibus* change the estate, which was fee simple conditional, into an estate tail, whereupon a reversion may depend. So that regularly, after that such possibility of issue is extinct, he is tied to the rules of a particular tenant, and may no longer use or enjoy those privileges incident to his first estate. And therefore if tenant in tail after possibility do alien, he shall forfeit his estate as tenant for life should do (2). 45 E. 3. 25 a. Also, if he make default in *præcipe quod reddat*, he in the reversion shall be received by the statute *Westm. 2. cap. 3*.—*Vide 10 Co. 44 a. Doct. & Stud. li. 2. cap. 1*. And by the statute made 9 R. 2. cap. 3. it is provided, that if tenant for life, tenant in dower, tenant by the curtesy, or tenant in tail after possibility of issue extinct, do lose in a *præcipe*, &c., that he in the reversion, his heirs and successors, shall have an attain, or writ of error, as well in the life of such tenants, as after their deaths, &c. 3 Co. 4 a; and to this effect is the case 2 H. 4. fo. 22 b. Waste was brought

(1) Winchester's case.—*Ed.*

it is a forfeiture. *Vide 45 E. 3.—Note in*

(2) Tenant in tail after possibility loseth his estate to the reversioner; resolved that

*MS.* And see Co. Lit. 28 a.—*Ed.*

against tenant for term of life, the remainder to the husband and wife in tail, the remainder in fee to the tenant for life, who saith, that hanging the writ the wife of the plaintiff is dead without issue, by this [the] writ of waste is determined; adjudged (1).

And if a conveyance made to John-at-Styles in tail special, the remainder over to him, in default of such issue, in general tail, or fee simple, the several estates shall be, the one in possession, the other in expectance; but if the first donee do become tenant in tail after possibility, so that his estate of inheritance is changed into an estate for life, now that estate is too feeble to support the expectant remainder; but that his great estate shall drown the lesser, and he shall not now be tenant after possibility with the other remainder expectant, but the law shall judge him in presently, and in possession of that estate which was limited in remainder; and so it is in case a reversion doth descend upon the tenant after possibility (2). 9 E. 4. 17. Note the consequence. *Vide* 50 E. 3. 4.

Although tenant in tail after possibility is not compellable to attorn, no more than tenant in tail is, when he in reversion granteth his reversion, as particular tenants are compellable to do, the true reason is because attornment is to the end to make privity, that he to whom the reversion is granted, may maintain an action of waste; and therefore tenant for term of life is compellable to attorn, but tenant in tail after possibility shall not be punished by action of waste, no more than a tenant in tail may be, therefore, &c. (3). 12 H. 4. 3 b.

Also, tenant in [tail after] possibility of issue extinct, hath [as] great a property in the trees growing upon the lands, and in other timber, as tenant in tail hath, whereof note in 11 Co. 80, *Lewis Bowles's case*: and there are three reasons wherefore tenant in tail after possibility shall not be punished by action of waste, 1. because his original estate is not within the statute of Gloucester, cap. 5. 4 Co. 63 a (4), because that statute of Gloucester is general, and then is to be taken strictly, and not construed by equity. *Dr. & Stu. li. 2. cap. 1. fo. 61*; because of the inheritance which once was in him; for it is to be observed that tenant in tail at the common law,

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(1) There is some difference between the case stated in the text, and the one referred to; it however only consists in this, that the wife had died, leaving issue,

before the writ of waste, and the issue died pending the writ.—*Ed.*

(2) See Co. Lit. 28 a.—*Ed.*

(3) See *Id. ibid.*—*Ed.*

(4) *Herlakendeu's case.*—*Ed.*

had a limited fee simple, and when his estate was changed by the statute *de donis conditionalibus*, yet there was not any change in that interest in doing of waste; so when by the death of one of the donees without issue the estate is changed, yet the power to do waste, and to convert it to his own use, is not altered nor changed, because of the inheritance which was once in him. Upon the same reason it is, that if a timber tree doth become *arida, sicca, non portans fructus, nec folia in æstate, nec existens mæremium*, yet because this was once an inheritance, &c., no tithes shall be paid for it; so that the quality thereof doth remain, although the estate of the tree be altered (1). In *Plowd.* 170 a (2), it is said by the Justices, that a house or a messuage doth consist of two things, that is to say, lands and buildings, and before the structure it was but land, and when the structure is composed, then it is a house, and thereby the name is changed utterly; for if the buildings do afterwards utterly decay, yet it shall no more be called land, although it be now nothing in substance but land; but it shall be called a toft; for the dignity which once it had above land.

For it is to be observed that tenant in tail after possibility, hath greater pre-eminence and privilege, in respect of the quality of his estate, than tenant for life; but he hath not greater quantity of estate than tenant for life. 11 Co. 80 a (3). But this privilege is annexed unto the privy of the estate; for it was adjudged in the case of *Ewens*, M. 28 & 29 Eliz. that where tenant in tail after possibility doth grant over his estate, the grantee was bound over in a *quid juris clamat* to attorn. *Ibid.* 83 b. And it was resolved that the estate of tenant in tail after possibility must be and remain residue of an estate tail, and that by the act of God, and not by the limitation of the party. *Ibid.* 80 b.

Also, although a tenant in tail after possibility shall not pray in aid of him in the reversion, if he be impleaded for his land, which is permitted for a tenant for life to do; the reason hereof is, because he is concluded to say, but that he took a greater estate by the livery and seisin made unto him, than only an estate for life. 10 H. 6. 1 b. 2 H. 4. 17. 8 H. 6. 25 a. *Bro. Ayd*, 37. 12 E. 4. 3 b.

Also, if a gift in special tail be made to a man and to his wife, upon condition one of the donees dieth without issue, so that the

(1) 11 Co. 49, R. Liford's case. 29 El. Rogers and Brookes; et in 11 Co. fo. 81, Lewis Bowles's case.—*Note in MS.*

(2) In *Hill v. Grange*.—*Ed.*

(3) *Bowles's case*.—*Ed.*

survivor is tenant in tail after possibility, the grantee of the reversion cannot take advantage of the condition broken against such a tenant, by the statute 32 H. 8. cap. 34; for his original estate is out of the statute, which was made only against leases for life, or years upon condition.

And in this case of tenant in tail after possibility, there is an alteration by course of law of the statute, without any transmutation of possession by matter of *post facto*; so is it in divers other cases; if a rent be granted for life, and the tenant doth attorn, or if a woman be endowed of a rent, which rent is behind, and after the particular estate in the rent doth determine by death, the executors of the tenant for life, or of the tenant in dower, shall have an action of debt by the common law; one reason thereof is, for that these particular estates, amounting to a real contract in law, this realty where the frank-tenement is determined, doth resolve itself to a personalty. 4 Co. 49 a (1). *Vide Littleton, s. 232*, a rent-service changed into a rent-seck, for which nevertheless he may distrain. 4 Co. 9 (2). Likewise a divorce altereth the estate of frank-marriage into a bare freehold. 7 H. 4. 16. *Vide Fulbeck's Direct. cap. 6.* 9 Co. 139 a (3). Note, if a man take a wife seised of a reversion, with a certain rent, and have issue, and the wife dieth, he shall be tenant by the curtesy of the rent, and the heir shall have the reversion, and so the rent shall be severed from the reversion, by the course of the law, and yet the husband may not distrain for the said rent, and yet it was a rent-service before in the wife. *Keilw. 104 b.* Estates by copy of court roll are in the law but tenants *ad voluntatem domini*, yet long time and custom of the manor have made them to be reputed inheritances, and are descendable. *Sect. 77.*

All which of their own nature are neither lands nor tenements, nor chattels, yet in time have gained another manner of reputation. 4 Co. 22. et 1 Co. in *Chudleigh's case*.

*Vide articul. Cleri, cap. 1. Res spirituales per venditionem fiunt temporales, et transeunt decimæ in catalla. Vide 7 H. 4. 35.*

A proviso good at the beginning, yet by consequent may be void. *Vide Dyer, 227.* 6 Co. 41 b (4).

And it is to be observed, that although the issues inheritable to the estate tail special be barred, yet nevertheless the donee in special

(1) Ognel's case.—Ed.

(2) Bevil's case.—Ed.

(3) Beaumont's case.—Ed.

(4) Sir A. Mildmay's case.—Ed.



tail thereby is not barred from being tenant in tail, and thereby only put to an estate in tail after possibility of issue extinct, or the estate of the donee should be changed into an estate for life dispunishable of waste, in the nature of a tenant in tail after possibility of issue extinct; but the donee doth remain, and as absolutely and as perfectly doth continue, seised of an estate tail, as at first: as for example, a gift is made to the husband and the wife in special tail, they have issue, the husband doth levy a fine, the issues are barred to claim any right of the estate tail; but the wife surviving is still tenant in tail, and not a tenant in tail after possibility of issue extinct. *Dyer*, 351 *b*. Also if one of the donees in tail special be attainted and executed, although their issues are barred to claim the estate tail, yet the survivor of the donees doth continue the first estate tail to all purposes. *Dyer*, 332 *b*; except that in such case the donee surviving cannot levy a fine, or suffer a recovery; of all such matter note well *Beaumont's case*, 9 *Co.* 139, *et seq.* But the case 7 *H.* 4. 16 (1), is good law, where a gift was made in frank-marriage, which is an estate in special [tail], where after a divorce, which is intended such a divorce as doth dissolve the marriage *ab initio*, and the husband and wife *a vinculo matrimonii*, the donees by this matter *ex post facto*, have but estates for lives, although they at first took an estate of inheritance in tail special; but this case is not like the former cases, for the estate tail is dissolved *ab initio*, and issues made bastards; but in the former cases the tail is barred, and not dissolved, or determined, but hath continuance so long as the wife liveth, or the heirs in tail remain. 9 *Co. ibid.*

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#### LIB. I. CAP. IV.—TENANT BY THE CURTESY.

§ 35. Tenant by the curtesy of England is, where a man taketh a wife seised in fee simple, or in fee tail general, or seised as heir in tail especial, and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth; yet if the wife dies, the husband shall hold the land during his life by the law of England: And he is called tenant by the curtesy of England, because this is used in no other realm but in England only.

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(1) See *Co. Lit.* 28 *a*.—*Ed.*

And some have said, that he shall not be tenant by the curtesy, unless the child which he hath by his wife be heard cry; for by the cry it is proved, that the child was born alive. Therefore *quare*.

The author of this law some men have asserted to [be] King Henry 1; who was surnamed Beauclerc, for his excellent learning. *Cowell's Inst. lib. 2. tit. 2. 18.* but the better opinion is, that he did only abolish such customs of Normandy, as his father had added to the common law; and therefore it was said of him that he did restore the common law of England. *3 Co. Pref.*

Littleton saith it is called the curtesy of England, because it is used in no other realms, but only in England; and some other laws there are peculiar unto England, which in all other places except England are not so; as that the church shall have probate of testaments, for the laity have probate of testaments in all other realms. *2 R. 3. tit. Testament, 4. 9 Co. 37 b, Henslow's case.*

And one other particular liberty to the church of England, above all other realms in Christendom, is this; that if a man stand wilfully 40 days together excommunicate, and be accordingly certified by the bishop into the Chancery, that then he is to be committed to prison by virtue of a writ directed to the sheriff. *Cosin's Apol. fo. 8.* Our word of inheritance (heirs), and that thereby the eldest son should inherit; and this our manner of conveyance, and limitation, is not read of in any other nation. *Salterne de Ant. Brit. Leg. cap. 1.*

Also, by the law of England, personal tithes are to be paid, which is not so in other countries, and nations. *Dr. & Stud. li. 2. cap. 55.* The lay people have the probate of testaments in all other nations, but in England, which is proved at large in *9 Co. 37*, and there note the consequence.

And yet by a proclamation *2 Jac.* it is declared, that this law of tenancy by the curtesy is in Scotland, and by them it is called *Curialitas Scotiae*. *Cowell's Interp. verbo Courtesy of England*; and I do not think but Littleton did know it so to be there; but, peradventure his meaning was, that it was originally used in the realm of England, for Scotland originally was part of England; and Justice Fortescue in his book saith, *fo. 24*, that was sometimes subject unto England, as a dukedom thereof: of this matter, see the notes upon *Fortescue, cap. 13*, made by John Selden. But, after the Scots had [with-] drawn their actual obedience, and exalted their territory into a monarchy, then Scotland was no longer to be

accounted parcel of England, and therefore Saunders' opinion hath been allowed,—that where by the Statute of Fines, made 4 *H. 7. cap. 24.* there is saving and exception for them [that] be out of the realm, so that they pursue their action according to their title within five years after their next return into England, that he, [that] was in Scotland at the time of the fine levied, shall be adjudged to be out of the realm of England, and so to be within the exception. *Plowd.* 368 (1). And for so much as this tenancy by the curtesy is peculiar to England, it is to be known, that although the king's dominions have increased sometimes, as by the Isle of Man, Guernsey, and Jersey, yet the custom or maxim of tenant by the curtesy hath no place there; neither doth it stretch into the Isle of Wight, although that be made parcel of the county of Southampton. *Keilw.* 11 *H. 8.* 202; for laws, customs, or privileges, within a precinct or dominion, shall not extend further, although the precinct or dominion be enlarged. *Plowd.* 129 *b.* et 124 *a.* (2).

And the professors of the Civil Law do not spare to affirm, that as in this case, the law of England doth not accord with the law of nations, so it is very hard and prejudicial unto the right heir, to whom the mother's inheritance should immediately descend; for it is limited not only to the natural father, but to the step-father, to enjoy his mother's land after her death, so long as he shall outlive, whereof, *Brac. li. 5. de Except. cap. 30. fo. 438 a; et quod dicitur de primo viro, dici poterit de secundo, [si postmodum nupserit secundo] viro, sive de primo viro hæredes habuerit apparentes, sive non plenæ ætatis vel minoris ætatis, quod quidem injuriosum est secundum Stephanum de Segrave maxime cum de primo viro hæredes habuerit, quod quidem sustinere posset, si nullos habuerit, dicebat enim, quod lex illa male intellecta fuit, et male usitata, [quia] quod dicitur de lege Angliæ intelligi debet, de primo viro et eorum hæredibus communibus, et non de secundo, maxime cum hæredes apparentes extiterint [de primo.] Et 1 *Perk.* 90 *b.* 8 *Cb.* 34 *b.**

Also, although it be true, that a prohibition was at the common law before the statute of Gloucester, cap. 5. prohibiting the tenant by curtesy, not to commit waste (4 *Co.* 62), (3) yet experience teacheth that the father being in possession of all, and the heir utterly unprovided for by the law, save only a long-looked-for re-

(1) In *Stowel v. Lord Zouch.*—*Ed.*

(2) *Buckley v. Thomas.*—*Ed.*

(3) *Herlakenden's case.*—*Ed.*

version, with which a man can neither keep hospitality, or build churches (5 Co. 2), he hath 'vantage over the heir, not only to force him to consent to the sale of the timber, and woods, but even to the lands themselves; and yet his part shall be least of the money, for which they were sold.

They also say the statute of Gloucester, cap. 3, was in good time made, for the common law did give liberty to any prodigal father to alien that land, whereof he was but tenant by the curtesy, to the disherison of the heir, because his warranty in that case was collateral. *Sect. 724.* Also, the statute 14 Eliz. cap. 8. was made to take from the tenant by the curtesy that liberty, which by the law before was permitted in suffering a feigned recovery to be had against him, of covin and purpose to do much wrong and prejudice to the heir.

#### ANSWER.

To these and all other objections, the common lawyers say, every nation hath his own proper municipal laws, which after long use they so approve, that they rather frame themselves to obey them, than enforce arguments to impugn the reason of them.

And this do the Emperors Honorius and Arcadius, in these words, command punctually to be observed, *mos namque retinendus est fidelissima vetustatis*, whereunto agreeth the old verse of *civium moribus antiquis res stat. Romana viresque*: to the same sense Periander of Corinth said, "that old laws and new meats are fittest for use;" hereupon also pertaineth that edict of the Censors, mentioned by Seutonius and Aulus Gellius, *quæ præter consuetudinem et morem majorum fiunt neque placent, neque recte videntur*; and the common lawyer saith, *qui rationem in omnibus quærunt rationem subvertunt.* 2 Co. 75 (1). *Vide Fulbeck's Direct. cap. 4. fo. 31.* And Cato said well, *vix ulla lex fieri potest quæ in omnibus comoda sit, sed si majori parti prospiciat, utilis est*, which sentence Catline, Chief Justice, voucheth, in *Plowd.* 369 b. (2) *Ad ea, quæ frequentius accidunt, jura adoptantur*, 5 Co. 127 b. (3). And it is adjudged in 21 H. 3. tit. Dower, 198, that if a man have issue by an inheritrix, who is dead, and which issue by possibility may inherit the land, he shall be tenant by the curtesy, although the wife by a former husband had issue inheritable: and with this doth

(1) In Lord Cromwell's case.—Ed.

(2) In Stowel v. Lord Zouch.—Ed.

(3) In Palmer's case.—Ed.

agree Littleton, *fo. 10 b. s. 52*; and so it is also adjudged 30 *E. 1. tit. Formedon*, 66, that the ancient common law was before the stat. Westm. 2. cap. 1. so is the statute *de Tenentibus per legem Angliæ*, see *Finch, lib. 2. fo. 39, in fine*. But if lands be given to a woman, and the heirs males of her body, and she take a husband, and have issue a daughter, the husband shall not be tenant by the curtesy; for the issue cannot by any possibility inherit the same lands, or tenements, and therefore the case is out of the rule of those judgments, and of Littleton. 8 *Co. 35 b. (1)*.

And they say it is convenient that the issue be in subjection to his father, and that his father have superiority and lordship paramount over him. Aristotle said, in his first book of Politics, *id quod procreavit ac genuit, id ut præsit, et amicitie ratio et senectutis postulat; ut legitur in Plowd. 304 a. (2)*. And they conclude, that the maker of this law of the curtesy, and that of the collateral warranty, did not consider things that happen contrary to nature, which [are] monstrous, for they happen but seldom. But those things which do stand with nature, and which do ordinarily and most commonly happen, and experience sheweth, that *amor distendit*, and therefore the presumption in law is, that the father will do nothing to his son's prejudice, or if he do, he will recompense him much more. *Plowd. 306*.

And as the law in those cases giveth to the father, as it were, a bridle to stay the son's temerity, so, in divers cases, the same law giveth to the eldest son immunities by the life of his father; for the common law doth give unto his father the custody and education of his son, and heir apparent, so that he shall not be in ward. And if the lord, or any other, do take him from his father, he shall have an action, and the words of the writ be, *quare filium et hæredem suum rapuit*. And if the father be killed, the son shall have an appeal of it; for it is a great loss to the son to lose his father; and therefore the common law doth give the appeal unto the son, before any other, for the earnest intent of revengement, which the law doth intend to be in him against the offender; and so by these cases we see, what reciprocation our law doth intend between the father and the son. The statute *de Articulis sup. Cartas*, cap. 11. doth ordain, that no minister, nor no other, (to have part of the things

(1) Paine's case: And see *Co. Lit. 29 b.*—Ed.

(2) In *Sharington v. Strotton*.—Ed.

which be in plea), shall take the business which be in plea, nor none upon such covenant his right shall let unto another: but the statute doth say, that this is not to be understood, that men may not have counsel of counsellors, and of sage men, for their fee, and of next friends: and in 6 *E.* 3. (1) the father being impleaded did make a scoffment, unto his eldest son and heir apparent, pending the suit: and the king brought a writ of champerty against the father and the son; and it seemeth there by the clearer opinion, that the action is not maintainable, and yet the case is within danger of the words of the act; for, although by the words of the act, the father might have had counsel of his son, as of one of his next friends, yet to make an estate unto him, it is prohibited by the words: but it is there taken, that by every law, the son ought to aid his father, and therefore the son shall not be intended by the statute, and so being within the words, he is out of the intent; for none that hath reason can make exposition to separate the son from the father, or the father from the son, either in assistance or counsel, who are so near conjoined by nature. If the son and heir apparent take a wife, and doth endow his wife in the land of his father, *ad ostium ecclesiæ ex assensu patris*, and dieth, the wife shall enter after the death of her husband, and have it for her dower; and so the wife of the son shall have dower of the lands of the father, for the marriage of the son, and this shall be called dower, and she shall have it without livery of seisin, only by the assent of the father. But the wife of no stranger might so have dower by such assent, and so we see, that the dower of the son's wife shall be translated unto the land of the father by his assent only, without other act; for the son's wife is in a manner as his own wife, for the love which the law doth presume between the father and the son, and within his charge. *Plowd.* 304*b.* (2). *et* 88*b.*

And to return to the matter from which I have somewhat digressed, this tenancy by the curtesy is not, by reason of any pact or agreement made between the husband and the wife, a jointure; but it is an estate created by law; for immediately after the death of his wife, the possession abideth still in him without entry, and he is in the post [by the law] and not by the wife or by the issue. *Dr. & Stud. lib.* 2. *cap.* 4. *fo.* 67. *Note, Bro. tit. Tenant by the Curtesy, 3 et 14. Keilw.* 118 *b.*

(1) 33, pl. 19.—*Ed.*(2) In *Sharlington v. Strotton*.—*Ed.*

But although tenant by the curtesy be in by the post, yet he may rebut the demandant with a warranty made to any ancestor of his wife, and so bar the demandant, and defend his possession. 35 Ass. pl. 9. 3 Co. 63a. (1).

Note.—Tenant by the curtesy may vouch the heir, but he shall not recover in value; for he doth not hold of the heir, but is tenant of the frank-tenement unto the lord paramount; and the lord shall make avowry upon him, as his tenant, *per la manner*: 14 Hen. 6. 25 a, b, unless the lord do alien his seignory mesne between the estate of the tenant by the curtesy, and the descent unto the heir; for then he shall not be in ward, though the two impediments be removed by the death of the tenant by the curtesy. *Ibid. in Bingham's case, in 2 Co. 92.*

And therefore although Littleton in this place saith, that the husband shall hold the land, but saith nothing of the body of the heir; yet it must be understood, that the heir shall not be in ward for his body, no more than for the land, during the life of the tenant by the curtesy. *Fitz. N. B. 143b.* And the reason is, because no freehold doth descend unto the heir, but doth continue in the husband: *Vide Litt. s. 394*, and the lord hath him for his tenant.—*Vide 2 Co. 92b. (2).* But if tenant by the curtesy, he is tenant to the avowry of the lord, *ergo. Dyer, 8a.*

The words of Littleton, in this section, are, "tenant by the curtesy of England is, where a man taketh a wife seised in fee simple, or in fee tail general, or seised as heir of the tail especial, and hath issue, &c."

But the student must join to this the other section 52, and so it will easily appear, that in some cases a man may be tenant by the curtesy, though his wife was seised but as tenant in special tail, and not as heir to an especial tail; as if lands be given to a woman, and to the heirs of her body begotten by J. at S. (her husband), this is a special tail to her; *see s. 29.* and yet, because the issue between her and her husband may inherit the land, and the same estate which his wife had therein, if he have issue by her, and do survive, he shall be tenant by the curtesy.

But for so much as this estate by the curtesy doth consist upon divers parts, as matrimony, having issue, the hereditaments thereof,

(1) In Lincoln College's case.—*Ed.*

(2) Bingham's case.—*Ed.*

and the seisin which the wife had during the coverture, I will particularly speak of them.

All and every such marriage as within the church of England shall be contracted, and solemnized between lawful persons, as by this act we declare all persons to be lawful, that be not prohibited by God's law, such marriage being contracted, and solemnized in the face of the church, shall, by authority of this parliament, be deemed, judged, and taken to be, lawful, good, and just, and indissoluble. 32 H. 8. cap. 38.

No person shall marry within the degrees prohibited by God, and expressed in a table set forth by authority in the year of our Lord God 1563; and all marriages so made and contracted, shall be judged incestuous, and unlawful, and consequently shall be dissolved, and void from the beginning, and the parties so married shall, by course of law, be separated. *Cannons*, 1630, 89. But if a marriage be made *in facie ecclesiæ*, within the Levitical Degrees, the woman having inheritance, and other complements necessary, and she die, no divorce being made in their lives, the husband may be tenant by the curtesy. 24 H. 8. *Bastardy*. Bro. 44.

Every man being, or which shall be, a papist recusant convicted, and who shall be hereafter married, otherwise than in some open church, or chapel, or otherwise than according to the orders of the church of England, by a minister lawfully authorized, shall be utterly disabled, and excluded to have any estate of freehold, into any lands, tenements, or hereditaments of his wife, as tenant by the curtesy of England. 3 Jac. [1.] c. 4.

Note, if mere *laicus* be presented, instituted, &c. to a church, the church is full, till the sentence of deprivation, and therefore any marriage solemnized by such a minister, before privation, and done *in facie ecclesiæ*, is good. *Vide* 5 Co. 102. *in Windsor's case*. *Vide Dyer*, 239 b.

A minister or priest marrieth with a woman inheritrix, he shall be tenant by the curtesy by express words of the statute. And in time of popery, when priests marriages were forbidden, and prohibited, if no divorce were had in the life of both parties, the husband surviving, in that case should be tenant by the curtesy, as it seemeth. 5 et 6 E. 6. cap. 10. 1 Jac. [1.] cap. 25. For such marriages were not void, as when a man marrieth a second wife, his first being then living. 21 H. 5. 30. *Fitz. Consultacion*, 5. *Servi matrimonium verum contrahunt jure nostro, et in hoc sequimur jus canonicum*. *Cowell's Inst.* li. 1. fo. 18 b. *Nota tamen, jura com-*



*nebij* extended, before Christianity received, only to [free] men, and the marriages [with bond persons] were always accounted but *contubernia* and not *connubia*, and they were styled *contubernaes*, and not *conjuges*, whereof you may read more in the notes upon *Fortes. cap. 42. fo. 49. Litt. li. 2. sec. 202.* And if a villain do marry with a bond, or free-woman, who hath inheritance by purchase, or by descent, and hath issue, he may be tenant by the curtesy. Idiocy in the man or the woman is no impediment, but that the husband may be tenant by the curtesy (1); 31 E. 3. *Saver de Defaut. Fitzh. 37. et Stamf. Prerog. 35a.*

The same law is, if neither of them can speak, nor hear. *Vide Bracton, li. 5. fo. 421.* An eunuch, or he that is *frigidus naturæ*, may be tenant by the curtesy, if she have issue, and he survive his wife, and no divorce had during their lives. *Vide 5 Co. 38b. for filius est quem nuptiæ demonstrant.*

*Parentum consensus apud nos non [tam] necessarius est, ut contractum matrimoniale inter liberos de presenti perfectum defectus ejus solvere possit. Contemplatio enim publicæ utilitatis privatorum commodis præfertur. Cowell's Inst. li. 1. tit. 10. s. 3.* And therefore though the marriage be had without consent of parents, the husband may be tenant by the curtesy.

*Of what things or hereditaments a man may be tenant by the curtesy, and what not.*

In the first chapter it is shewed, that inheritance may be not only of things corporeal, but also of things incorporeal, and regularly a man may be tenant by the curtesy in either of those things, as of a fair, which is but a franchise, or liberty, not manurable.—5 Co. 23, of an advowson, villainy, common of pasture, and of other profits. *Vide Fitz. N. B. 148, 149.—5 Co. 87a, of a mill, or of an office. Vide 2 H. 6. 9.—9 H. 8. 194. pl. 1, in Keilway. et Dyer, 71.* But if a man be a duke, earl, marquis, or baron, to him and to his heirs, and that dignity or honor doth descend unto a woman, she taketh a husband, and hath issue, &c. and dieth, a question may be made, whether her husband shall bear the style or dignity of the title of honor, or no; for on the one side it may be said, that the title of honor is only inherent in the blood of the donee and his

(1) See Co. Lit. 29b.—Ed.

heirs, *et est individuum et individuum inseparabile*.—*Vide in Ratcliff's case, in 3 Co. 42.* And on the other side, if he should not be tenant by the curtesy, then should his son after the death of his mother dying in the life-time of his father, be a baron and lord of the dignity without lands, which were inconvenient.

But if the wife be seised of lands, within which is a mine of coals, lead, or a quarry of stones, which was never opened during the coverture, the husband may be tenant by the curtesy of the land, but if he open the mine, it is waste.—*Fitz. N. B. 149.*—*5 Co. 12.*—A man may be tenant by a curtesy of a rent, for it doth issue out of land, and is of the nature of the soil.—*Fulbeck, 70.*—*4 E. 3. 53.*—*14 H. 8. 5,* but not so of an annuity in fee granted to a woman.—*Doct. & Stud. li. 1. cap. 30.*—*4 Co. 48. 49.* If a rent charge be granted in fee to a woman married, the woman dieth before any election, whether she will by distress make it a rent, or by action of annuity make it but an annuity, he shall be tenant by the curtesy, and the election shall not be in the heir to prejudice a third person. *Vide Litt. fo. 48. [s. 219, 220.]* A man marieth with the queen of England, and hath issue, she dieth, he shall not be tenant by the curtesy by the common law, and therefore the statute 1 Mary, c. 2, to bar King Philip in that case, was superfluous. Note, the law of the crown differeth from the common law course. *The Lord Chancellor's Speech in this case of the Post-nati.*

Note also, there is no tenancy by the curtesy of copyhold lands, without special custom in the case.—*4 Co. 22 b. (1).*

*What seisin in the wife is sufficient and requisite to make the husband tenant by the curtesy.*

The prescript rule of the law is, that an actual seisin is necessary in this case; and the reason thereof is, because tenant by the curtesy shall be attendant to the lord paramount, which could not be in case his wife [died] before she were actually seised; for in such case the issue must make himself heir unto him who was last actually seised.—*8 Co. 36 a. (2).*

And therefore if a man seised of certain lands in fee, hath a daughter which is heir apparent, the daughter taketh a husband, and they have issue, the father dieth seised, and the husband as

(1) Copyhold cases.—*Ed.*

(2) Paine's case.—*Ed.*

soon as he heareth of his death, goeth towards the lands to take possession, and before he can come there, his wife dieth, he shall not be tenant by the curtesy in this case.—*Dr. & Stud. li. 2. cap. 15.* But of a rent or of an advowson, he shall be tenant by the curtesy, if the wife die before the rent day, or before the avoidance; and it is agreed in 7 *E. 3.* 66, and 3 *H. 7.* [5 *a.*] one reason whereof is made in *Dr. & Stu.* before mentioned, because the maxim of the law is so in the one case and not in the other, and in 1 *Co.* 97 *b.* (1), one other reason is made; because it was impossible by the act of God for the husband to have actual seisin of the rent, or of the advowson. And when the law doth prescribe a means to perfect or settle any estate or right, if by the act of God this means doth come impossible, yet no party, who was to have benefit of the means, had [they] been with all circumstances executed, shall suffer any prejudice in not executing it in such circumstances, which became impossible by the act of God, so that all things be performed with diligence, which the parties ought to do; for it should be against reason, that those things which be inevitable by the act of God, and which no industry may avoid, nor policy prevent, should be construed in prejudice of any, in whom was no laches or default.—*Co. ibid.* And the rule in this case, and in others like is, *quod remedio destituitur ipsa re valet, si culpa absit.*—6 *Co.* 68 *a.*—*Vide sect. 179.* But in the case of lands descending upon the daughter, it may be said, that the husband might, before the death of that ancestor to his wife, have spoken to a man, who is dwelling near to the place where the lands &c. are, to re-enter for his wife, as in her right, immediately after the death of the ancestor of the wife.—*Perk.* 91 *a.* [s. 470.] If a man take a wife seised of a reversion, on a lease for life, whereupon a rent was reserved, he may be tenant by the curtesy of the rent, but not of the reversion (2).—*Keilw.* 104 *b.*—*Vide Perkins*, 90 *b.* [s. 467.] But if a man, seised of lands in fee, doth make a lease thereof for years, and after taketh a wife, and have issue a daughter,

(1) In Shelley's case.—*Ed.*

(2) There is a very short note on this passage in the Harleian MS. signed N. C., which I cannot decipher; it evidently refers to the *quære* in Perkins, sect. 467, whether if a woman seised in fee makes a lease for life, reserving rent to her and her heirs, the husband shall not have curtesy in the rent during the lease.

Mr. Hargrave, in his edition of *Co. Lit.* note 7, 29 *a.*, notices the same *quære*, but gives no opinion on the point of law; but the editor of the last edition of Perkins, (Mr. Greening), gives it as his opinion, that in such case the husband shall not take the rent by the curtesy; contrary to the opinion of our Commentator.—*Ed.*

and dieth, it was resolved in the commencement of the reign of Queen Elizabeth, in the case of one Guararra, that the husband of the daughter shall be tenant by the curtesy of the land (8 Co. 96 a); for the possession of the lessee for years doth settle the inheritance in the wife actually.

Grandfather, mother, and son, grandfather seised of lands in fee dieth, so the land descendeth to the mother, daughter of the grandfather, who entereth; she hath issue, and dieth; her husband is tenant by the curtesy of all, and entereth according to his title, against whom the wife of the grandfather recovereth her dower, and after dieth; the husband of the mother shall not be tenant by the curtesy of that third part, because that seisin which once he had, was voided by a more ancient title. But if the grandfather had conveyed the land to his daughter by deed, and so as she had it by purchase, and not by descent, then otherwise it is.—*Vide Lit. 92 b. [s. 393.]—4 Co. 122 a. (1).*

A man seised of land in fee hath issue a daughter, and she taketh a husband; they have issue; the father dieth, his wife *enceinte* with a son; the husband entereth, and after a son is born, and he entereth by his guardian; that daughter dieth; he shall not be tenant by the curtesy, for that possession which once he had in his wife's right, was lawfully defeated.—*Bro. tit. Tenant par le Curtesye, 13.*

But if a man take an inheritrix to his wife seised of lands in fee tail, and hath issue; the issue dieth; he shall be tenant by the curtesy after the death of his wife, although the estate tail is determined: 8 Co. 34: for in this case the rule doth not hold, *cessante statu primitivo cessat derivativus*; for his estate to be tenant by the curtesy is not derived merely out of his wife's estate, but is created by the law, by privilege and benefit of the law, tacitly annexed unto the gift.—8 Co. 36 a. and see more of this matter before, in the end of the 18th section.

If a wife seised in fee take a husband, the lord entereth claiming the land before they have issue, that possibility, which the husband had, is gone; but if they had issue before the entry made by the lord, he shall be tenant by the curtesy after the death of his wife, and put out the lord.—*Vide Lit. sect. 90.—Bro. tit. Tenant par le Curtesye, 14.*

*The issue which he of necessity must have that claimeth to be tenant by the curtesy.*

*Inter liberos non computantur, qui contra formam humani generis converso more procreantur, veluti si mulier monstruosum sit enixa. Partus autem qui membrorum officia ampliavit ut si sex digitos habeat, vel si quatuor tantum, vel si tantum unum, talis inter liberos numerabitur. Sed hermaphroditus inter liberos numeratur.—Bract. li. 1. cap. 6. numero 7.—Lib. 4. tract. 3. cap. 13.—Lib. 5. tract. 5. cap. 30. (1).*

Note, if a man seised of land in fee, hath issue a daughter, and dieth; she entereth, and hath issuē two daughters, one before espousals, and the other after; the mother dieth; the two daughters enter as coparceners, and make partition; she that was born before espousals taketh a husband, hath issue, and dieth without interruption; he shall be tenant by the curtesy.—21 E. 3. 34. A man taketh a wife seised of estate of inheritance, she committeth felony, and is executed, if there was no issue between them before the felony, he shall not be tenant by the curtesy, but otherwise if they had issue. 21 E. 3. 49 b.—11 H. 7. 19 b.—Bro. Tenant par le Curtesye, 3.

If a woman inheritrix be *grossemēt enceinte* by her former husband, and before her deliverance she take another husband, he shall not be tenant by the curtesy by reason of that issue; but if a woman not married inheritrix, be *grossemēt enceinte*, and so taketh a husband, and within two days after the marriage she is delivered, the husband shall be tenant by the curtesy by that issue, though he never had other issue by her.—18 E. 4. [29].—Cowell's Inst. li. 1. tit. 10. s. 17.—Terms of the Law, tit. Bastardy.

A woman inheritrix doth elope from her husband, and hath issue by the adventurer, and dieth not reconciled to her husband, he shall be tenant by the curtesy, that notwithstanding.—1 H. 6. 3 a, by Hales.—18 E. 4. 29 a.—7 Co. 44 a.

And it seemeth if a *femme* inheritrix do take a husband, and after divorce is had only *à mensd et thoro*, and afterwards she taketh another husband, and is married *in facie ecclesiæ*, and hath issue by that second husband; yet that issue shall suffice to enable the first husband to be tenant by the curtesy; for the law shall judge that the first matrimony was not dissolved, and for the legitimization of the issue, he shall be the issue of the first husband.

(1) See Co. Lit. 29 b.—Ed.

An infant under the age of fourteen years taketh a wife seised of lands of estate of inheritance; she is delivered of a child during marriage, and dieth before her husband is fourteen years old; he shall not be tenant by the curtesy of her inheritance, although they live divers years after together, but if he have issue by her after fourteen years, otherwise.—1 H. 6. 3 b, *Strange*.—26 Ass. pl. 54. *Brooke*, 32.—*Dyer*, 369 a.—*Vide* 38 Ass. pl. 24. *Consensus non concubitus facit matrimonium, et consentire non potuit ante annos nobiles*.—6 Co. 22 b. And the reason in the case of tenancy by the curtesy is, because as the law doth necessarily require that he should first get a child, so the impossibility thereof before he do attain to that age of fourteen is also known to the law; insomuch as it shall judge that child a bastard, though born within those espousals, to which he could not give consent unto before.

But whether it be necessary that the issue be heard to cry, Littleton maketh a doubt; for Bracton, who wrote in Henry the Third's time, saith, *licet partus naturaliter mutus nascatur et surdus, tamen clamorem emittere debet, sive masculus sit, sive femina, [nam] dicunt E. vel A. quotquot nascuntur ab Eva. Non sufficit igitur [tantum] baptizatus et sepultura*.—Li. 5. fo. 438. But late opinions be contrary in this point (so that the issue in truth be alive) (1).—*Perk.* 91. [s. 471].—*Dyer*, 25.—*Kitchin*, 159, for, saith he, the trial and the issue shall not be, if the infant were heard cry after the birth, but if it were born alive or not.

Note, 8 Co. 35, where you may read a good opinion that a child that is ripped out of its mother's belly, who was an inheritrix, is not such an issue as may make the husband to be tenant by the curtesy, though the child were living, and heard cry; for his title must commence by the issue, and consummate by the death of the wife; and the estate of the tenant by the curtesy ought to take away the mediate descent; but if the husband have issue by the wife, and after the land doth descend to the wife, whether the issue be dead or alive at the time of the descent, he shall be tenant by the curtesy; for the time of the birth of that issue is not material, so it be in the life of the wife. But if a woman be delivered of a child somewhat before her ordinary time, by occasion of some casual misfortune, yet by such a child the husband may be entitled to be tenant by the curtesy.

(1) See Co. Lit. 29 b.—Ed.

It seemeth also by Bracton, in the place last mentioned, that baptism was necessary in this case; but Perkins, in the place before mentioned, saith, if the baptism were not omitted by the negligence or default of the husband, but by sudden death, then the husband may be tenant by the curtesy.—See in *Keilw. fo. 2*, this scruple over-ruled without such distinctions.

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## LIB. I. CAP. V.—OF DOWER.

§ 36. Tenant in dower is, where a man is seised of certain lands or tenements in fee simple, fee tail general, or as heir in special tail, and taketh a wife, and dieth; the wife, after the decease of her husband, shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty, by metes and bounds, for term of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine years at the time of the death of her husband, for she must be above nine years old at the time of the decease of her husband, otherwise she shall not be endowed.

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In this chapter is treated of the provision which by the common law is made [for] the convenient livelihood of the wife after the death of the husband, viz. of his lands and tenements of his estate of inheritance, whereof he was seised in fee simple, or in general tail, wherein are some limitations, as there be in the former law of tenant by the curtesy; for no more than that husband of a sovereign queen of England may be tenant by the curtesy of the crown, or of any hereditaments of the queen, no more do the laws of the crown permit the wife of the sovereign king to demand dower of the king's lands, and it is presumed that other provision of a higher nature, according to her dignity, is made for her at or before her marriage with the king. *Egerton, in his Book of Post-nati, fo. 36. Vide 9 H. 6. 12 a.* The queen had by parliament a provision in lieu of her dower, whereof one thousand pounds was assigned *ex magna custuma de London*; vide in *Sir J. Davies' R. fo. 9 a, in fine*; which

is an argument, that the king hath greater estate in the grand custom than for his life. *Read the book.*

Also, the wife of a copyholder in fee, shall not have dower of a copyhold, except it be so by special custom of the manor. 4 Co. 30 b (1); for copyholders have estates of inheritance *secundum quid*, that is to say, to be descendable by custom to the heirs, and not to be determined by their deaths, or subject to the will of the lord, as other estates at will are, but they are not estates of inheritance *simpliciter*, (scil.) to all other collateral qualities, but such as custom hath allowed, or which are incident to them. *Ibid. b.*

And it is to be observed, that the wife during the coverture hath no benefit or profit of her dower, except in the case of the king's wife, for she is a person exempted by the common law. 4 Co. 23 b.—*Ad lectorem, ante, li. 6, in Co.* For the woman, that will challenge her dower, must make three things good, viz. 1. that she was married to her husband; 2. that he was, during the coverture, seised of an estate of inheritance in the land whereof she demandeth dower; 3. that he is naturally dead. 2 Co. [93] in *Bingham's case*.—*Plowd.* 373 (2).

*Dos quidem perfecta esse non potest ante mortem viri, nec quamvis in vita viri possit constitui, tamen ante mortem seysina non poterit assignari. Bracton, fo. 92. Nota, in 10 Co. 49 a, b (3). Quando diversi desiderantur actus ad aliquem statum perficiendum, plus respicit lex actum originalem, quia cujusque rei potissima pars est principium.* So in this case by the intermarriage and seisin of the husband, the wife hath a possibility to have dower; but her title is not consummate before the death of her husband. And yet it appeareth (sect. 357), that if the feoffee upon condition do take a wife, the feoffor may enter for the condition broken; and the reason is, because the law hath principal respect to the original and fundamental cause; and yet it may be said that the title of dower is not consummate till the death of the husband, and that the wife may die peradventure before the husband.

And she shall have for her dower but the third part, whereas the husband shall be tenant by the curtesy of all; and the reason of this diversity in the law may be, because to all government and direction men be more apt than women, as Aristotle saith, *mas ad principatum aptior est natura quam femina*. And as a woman is not

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(1) Shaw and Thompson.—Ed.

(3) In Lampet's case.—Ed.

(2) Stowel v. Lord Zouch.—Ed.



so apt as a man is to govern in high degree, or in high things, so is she not in things of base degree. *Plowd.* 805.

And another is for a proportional equality to be had between his wife and his heir apparent, so that his wife may have a reasonable proportion for livelihood, without depending upon his heir; and his the greater part, because he is to sit [in the seat of his ancestor] and do service to the king and commonwealth, in such good plight as his ancestor did. 6 Co. 17 (1).

It appeareth in this section, that the wife shall be endowed, if she be past the age of nine years, at the time of the death of her husband. *The Book of Entries*, 223. 12 H. 4. 3. and sect. 42. and *Fitz. N. B.* 149 b. and by *Dr. & Stud. li. 1. cap. 7. fo. 14 a. Dyer*, 313 a.

Which also is in favor to the woman for her dower, and of her speedy advancement, more than to the husband for his title to be tenant by the curtesy; for he cannot be tenant by the curtesy, although his wife be seised, and that actually, and though she have issue during the coverture, unless he be also above the age of fourteen years at the time of the death of his wife, as in the present chapter more at large may appear, *maturiora sunt vota mulierum quam virorum.* 6 Co. 71 a.

Also in this case of dower it is nothing material, though the husband at the time of his death be *infra annos nubiles*, which also is in favor of the woman, and for her advancement by marriage. *The Book of Entries*, 223. 12 H. 4. 3. *Bract. li. 2. fo. 92.* *Fitz. N. B.* 149 b. *Dr. & Stu. li. 1. cap. 7. fo. 14.* *Dyer*, 313. 7 H. 6. 11 b. 24 E. 3. 30.

And by this it may be observed that matrimony *ante annos nubiles* is lawful, and perfect *quoad dotem*, for *ubi nullum matrimonium, ubi nulla dos, et ubi dos ibi matrimonium.* *Bract. li. 2. cap. 39.* 7 H. 6. 11 b. But to other purposes such *matrimonium ante annos nubiles* is but *inchoatum et imperfectum*, for *consensus non concubitus facit matrimonium, et consentire non possunt ante annos nubiles.* 6 Co. 40, et fo. 22, and in *Dyer*, fo. 369. See the certificate of the bishop in that case (scil.), a woman of full age did contract matrimony by words *de presenti tempore*, with a young man of the age of twelve years, and this was solemnized *in facie ecclesie, et quodammodo consummat*, the man being put in the bed with her, and the opinion of divers doctors was, and being de-

manded by the Justice they said; we are of opinion in this case, that she is to be accepted, and taken for a lawful wife, and that she was joined<sup>3</sup> in lawful matrimony, and that the ordinary ought so to certify, as the case is put touching dower, *quamvis alias sint sponsalia de futuro, tamen in causâ dotis extenduntur, ad verum matrimonium ratione privilegii. Vide 6 Co. 40 b.*

Concerning that which is said in this section, that the wife shall have her dower assigned by metes and bounds, read afterwards *sect. 44.* And here I would take occasion to set down the several ages which the law doth consider in divers cases, but I do refer that to another place more fit, *sect. 104.*

And it is in this place observable, although Littleton saith, tenant in dower is where a man seised of certain lands or tenements in fee simple, tail general, or as heir in tail special, (for such an heir is tenant in general tail) and taketh a wife, and dieth, his wife after the decease of her husband shall be endowed, &c.

Yet *sect. 53* he saith, that if tenements be given to a man and to the heirs which he shall engender of the body of his wife, in this case the wife hath nothing in the tenements by the form of the gift, and the husband hath no estate only in special tail, and yet if the husband do die [without issue,] the same wife shall be endowed of the same tenements, because the issue which she by possibility might have had by the said husband, might inherit the said tenements: so the meaning is that she taketh nothing by the form of the gift, but nevertheless it is no exclusion of such collateral title, or interest, which she claimeth for her dower.

But it is necessary that the husband be seised during the coverture of such lands, or tenements, whereof his wife is dowable (scil.) either *en fait*, or in law, as before appeareth, for otherwise she is not dowable. *Vide Perk. fo. 60. s. 302. et seq. Nota, 2 Co. fo. 50 a, Blythinaw's case. 8 Co. 96 a, Sir William Cordell's case.* And the husband may prejudice his wife by laches of entry, by laches of suit, and by divers other acts, whereof *vide Perk. fo. 72, et seq. [s. 366, &c.]*

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§ 37. And note, that by the common law the wife shall have for her dower but the third part of the tenements which were her husband's during the espousals; but by the custom of some county, she shall have the half, and by the custom in some town or borough,

she shall have the whole; and in all these cases she shall be called tenant in dower.

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The quantity which the common law doth give for dower is the third part, and the words of *Magna Charta*, li. 7. are *assignetur ante ei pro dote sua tertia pars totius terræ mariti sui, quæ fuit sua in vita sua*, which words are but declaratory of the common law, as almost every chapter of *Magna Charta* is. See *Bract. li. 2. cap. 39. fo. 92.* And by that in this section mentioned, concerning customary dowers, varying from the course of the common law, must be observed the rule in 4 Co. 21, et 28, *consuetudo [loci] est semper observanda; consuetudo est altera lex.* And more hereof, read in sect. 166. *Nota*, the end of this section hath these words, *viz.* in all those cases of custom she shall be said tenant in dower; and *vide* 21 E. 4. 54 a, exception taken to the plea of the woman in such a case, because she did not say, that she did enter in the name of dower, but as tenant for term of life.

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§ 38. Also, there be two other kinds of dower, *viz.* dower which is called dowment at the church door; and dower called dowment by the father's assent.

§. 39. Dowment at the church door is, where a man of full age seised in see simple, who shall be married to a woman, and when he cometh to the church door to be married, there, after affiance and troth plighted between them, he endoweth the woman of his whole land, or of the half, or other lesser part thereof, and there openly doth declare the quantity and the certainty of the land which she shall have for her dower. In this case the wife, after the death of her husband, may enter into the said quantity of land of which her husband endowed her, without other assignment of any.

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There are also two other dowers, whereof the law taketh notice, dower *ad ostium ecclesiæ*, and that *ex assensu patris*, which, though they do exceed or diminish the quantity of that former, which is said to be the dower at the common law, yet the law doth allow of them also, if they be made in such form as the law doth require; and by the ancient opinions, only a third part might be assigned

*ad ostium ecclesiæ*; so are Glanvill (1), Bracton, &c. But, according to Littleton, see *Fitz. N. B.* 150. 9 *H. 3. tit. Dower*, 190. *the notes upon Hengham, fo. 152*; and the wife by such dowers may be concluded to have the other dower of the third part, if in the land so assigned, she doth enter [upon] the death of her husband: which note; for it is contrary to the rule of the common law, which is, no right or title which [any one] hath to lands or tenements of any estate of inheritance, or freehold, shall not be barred by acceptance of any manner of collateral satisfaction, or recompence. 4 *Co.* 1 (2), and in 9 *Co.* 79 b (3).

The law doth not allow of clandestine matrimony, but of those that be solemnized *in facie ecclesiæ*, and in public. Yet sometimes privileges have been granted to certain chapels, and other hallowed places, and to the church porch, or at the door of a monastery, in which they might lawfully solemnize matrimony: *Fitz. N. B.* 150. *Perk.* 61. [s. 306]: where you may read, that in the time of King Henry the Third, it hath been holden, that if a woman had been married in a chamber, she should not have dower by the common law. *Bract. li. 2. cap. 39. et li. 4. tract. 6. cap. 9*; but the law is contrary at this day, the marriage standing good, and the parties by ecclesiastical justice punishable. *Fitz. N. B.* [*ubi supra.*]

He that will endow his wife *ad ostium ecclesiæ*, must be of full age, which in the former dower is not necessary, as appeareth. The reason and cause hereof is, because dowment *ad ostium ecclesiæ* is made of a more or less quantity, according to the agreement of the parties, and not by the law only; and he being of full age, *modus et conventio vincunt legem.* 7 *Co.* 28 b.

And if an infant *ante annos nubiles* endow his wife *ad ostium ecclesiæ*, such endowment is void, notwithstanding he do agree, and assent to the same espousals, and endowments, after that he is of the age of fourteen years or twenty-one years, for *quod ab initio non valet in tractu temporis non convalescet, et quæ male sunt inchoata principio, vix est ut bono peraguntur exitu.* *Perk.* 85. [s. 438]. 2 *Co.* 55. 4 *Co.* 2 b. 90.

Also, the husband must be in this case seised in fee simple, and not in tail, as by the 46th section is further explained. Also, this

(1) Glanv. lib. 6. c. 1. Bract. lib. 2. c. 38, 39; and lib. 4. tract. 6. c. 1. & 6. and see Co. Lit. 34 b.—Ed.

(2) Vernon's case; and see Co. Lit. 36 b.—Ed.

(3) Peytoe's case.—Ed.

dower *ad ostium ecclesiæ* must be made openly, and in certainty, for *in lege nihil est verum quod non probatur*, and these things which pass in secret, and under hand, the law doth not give approbation of. 3 Co. 81 a. And certainty doth make repose, and quietness, but uncertainties do engender suits, and contentions. *Plowd.* 1. Case. Uncertainty is always the mother of contention. 5 Co. 2 a. *Vide* 9 H. 3. tit. Dower, 190. A man *ad ostium ecclesiæ* doth assign to his wife, when he is espoused to her, the moiety of all his lands and tenements, which he shall be from thenceforth seised of, and afterwards he purchaseth lands, &c. and dieth; the wife brought a writ of dower *ad ostium ecclesiæ*, and demanded the moiety; and the opinion of the court was clearly, that she should have it. *Id certum est, quod certum reddi potest.* 9 Co. 47 a.

And the consequence of this dower in certainty to be done is, that after the death of her husband, she may enter into those lands without any other assignment to be made unto her. Whereas when she is dowable by the order of the law of a third part, or in dower *ad ostium ecclesiæ* of a moiety, or greater, or lesser quantity, of her husband's lands generally, she may not, in this general and uncertain case enter after the death of her husband, but must expect until it be assigned unto her by the heir, &c. upon whom the inheritance of all the land doth descend, or is come, least peradventure she should enter upon more or less, than in right she ought to have. But if dower *ad ostium ecclesiæ* be made of a moiety of his land, it is good, as in this section it appeareth, whereto agreeth *F. N. B.* 150 a. which also is further explained in the 46th section following. But from this general rule this special case must be excepted, *viz.* if the husband, after such dower made *ad ostium ecclesiæ*, do thereof enfeof a stranger, she may not now enter after her husband's decease upon the alienee, for the mischief of the warranty; for after she entereth, the feoffee may not have a writ of warranty *cartæ*, because that writ lieth not but where the tenant is impleaded; and he cannot vouch for the same cause.

And it may be observed in this case, that a frank-tenement is conveyed from the husband, and that by the opinion of law, as in the other case of dower at the common law, and also he doth in this case give unto his wife, which in other cases he cannot do, because they are both but one person in law, as appeareth in section 168; whereby is to be marked, how much the law doth favor the marriage of a woman, and their advancement thereby. *Vide Plowd.* 58; and the *Lord Darcy's case*, in 6 Co. 71.

§ 40. Dowment by assent of the father is, where the father is seised of tenements in fee, and his son and heir apparent, when he is married, endoweth his wife at the monastery or church door, of parcel of his father's lands or tenements with the assent of his father, and assigns the quantity and parcels. In this case, after the death of the son, the wife shall enter into the same parcel without the assignment of any. But it hath been said in this case, that it behoveth the wife to have a deed of the father to prove his assent and consent to this endowment. *M. 44 E. 3. f. 45.*

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This also is one of the dowers *ad ostium ecclesiæ*, and hath the nomination of dower *ex assensu patris*; but it appeareth by other books, that it may also be *ex assensu matris* (1). *Fitz. N. B.* 150 *e. Perk.* 86. [s. 441.] *Dower, Fitz.* 186. 191; but *ex assensu fratris*, or *consanguinei*, is not good. *Perk. Ibid. Dower. Fitz.* 193. Contrary to the ancient opinion; for Bracton, *li. 2. cap. 39. fo. 92 a.* saith, *utile est mulieres esse dotatas multis de causis, et fit ei donatio à viro suo multis modis propter nuptias, de re propria [viri] vel de re patris, vel matris, fratris, vel sororis, vel alterius amici, de eorum consensu et voluntate, quæ quidem donatio dicitur dos, et ea quidem perfecta esse non potest ante mortem viri.* But in some special cases the father hath greater privilege, in regard of his heir apparent, than the mother in like case may have, which see s. 114, which note.

And this law is grounded [on] and doth pursue nature, and in regard only thereof, the wife of the son shall have dower of the land of the parents, for the marriage of their son and heir; and he shall have it without livery of seisin, only by assent of the parents, but the wife of no stranger may in that sort have dower by such assent: and so we see, that the dower of the wife of the son shall be translated from the son to the land of his parents by their assent, without any other act, for the wife of the son is in a manner as his own wife. *Plowd.* 304 *b.* 305 *a.* (2) And where the dowment *ex assensu patris, vel matris*, is good and sufficient in law, the wife of the son immediately after the death of her husband, and in the life of the

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(1) See Co. Lit. 55 *b.*—*Ed.*(2) In Sharlington v. Stoughton,—*Ed.*

father of the husband, may enter into the same lands and tenements so unto her assigned for her dower. *Perk.* 86*b.* [s. 444.]

*Quære*, if there be grandfather, father, and son, the father dieth; if the son may endow his wife by the assent of the grandfather. *Vide Bract. ubi supra. Vide 6 Co. 22b.* (1), for there it was agreed, that the grandfather shall not have the wardship of the son and heir within age, the father being dead in his life-time. And this by the way is not to be permitted, that this privilege the common law doth give when the son and heir apparent doth marry with the consent of parents, for their consents are to be had immediately after the affiance made between them *ad ostium ecclesiæ*, although for the contempt thereof, the marriage of children is not void or voidable. *Cowell's Inst. li. 1. fo. 19a.* And it hath been holden in ancient books, that if the son and heir apparent do marry against the good will of their parents, and after *infra octo septimanas* the son doth endow his wife *ex assensu patris* of the lands and tenements of the father, that was a good endowment. *Perk.* 86. [s. 443.] But this privilege doth only belong to the son and heir apparent; as that other, that his body shall not be in ward during the life of his father, for any lands holden by knights' service, or *in capite*, which hath descended unto him from his ancestors of the part of his mother, *sect. 114.* For as it is said upon another point, *hæres est alter ipse, et filius est pars patris, et mortuus est pater, et quasi non est mortuus, quia relinquit similem sibi.* 3 *Co.* 12*b.* For the common law doth favor him, whom the common law doth make heir, because he is to sit in the seat of his ancestor, and to do service to the king and commonwealth, in such good estate as his ancestor did, as is aforesaid; and although in that case here first put, the father shall have the wardship of his daughter and heir, and not the lord, as well as he shall have the wardship of his son and heir. 3 *Co.* 38. (2); 6 *Co.* 72.; and 7 *Co.* 13; yet, without doubt, the daughter and heir apparent, cannot, in such form *ex assensu patris*, make unto her husband an estate to be tenant by the curtesy of her father's lands, and tenements, after issue [and] her decease, for divers causes.

And some have been of this opinion, that of gavelkind lands, or borough English, the heir apparent cannot endow his wife, *ex assensu patris*, because such are not certainly heirs apparent; for, in

(1) Gorge's case.—*Ed.*

(2) Ratcliff's case.—*Ed.*

the one case, the father may have more issues, and in the other a younger, that is heir (1). 3 Co. 38. 6 Co. 22(2).

It seemeth Littleton's opinion was in this case, that it is necessary to prove the assent of the parents by their deed in writing, and that it sufficeth not, if she can prove it by witness, whereto doth agree *Perk.* 86. [s. 442.] and 40 E. 3. 45. *Feoffments et Fails, &c.* And I think it a safe way to incline to these late authorities, because they have had view and consideration of the former authors. *Vide Bract. li. 2. fo. 95. Dower. Fitz. 186.* and the father may lawfully make a deed in that case, which the husband could not do in the other case of dower *ad ostium ecclesiæ. Finchden, 40 E. 3. 43 a.m.*

Littleton putteth the case of dower *ex assensu patris*, where the father is seised in fee; and therefore if such a dowment be made of lands and tenements, which the father holdeth for the term of his life only, at the time of the endowment, it is not good. But if the father be seised in tail of such lands, of which such dowment is made at the time of his assent, he shall be bound by it during his life, but the issue in tail shall not be bound by it, nor the wife of the father who hath title of dower to the same land before such assent, nor no strange person who hath older title to the same land, shall not be bound by such assent. *Vide Perk. 87 a. [s. 447.]*

§ 41. And if after the death of her husband she entereth, and agree to any such dower of the said dowers at the church door, &c. then she is concluded to claim any other dower by the common law of any of the lands or tenements which were her husband's. But if she will, she may refuse such dower at the church door, &c. and then she may be endowed after the course of the common law.

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Although by the rule of the common law, that a right, or title, which any man hath unto lands or tenements of any estate of inheritance or freehold, shall not be barred by the acceptance of any collateral satisfaction, or recompence, but by release or confirmation; yet in the case of dower *ad ostium ecclesiæ*, or *ex assensu patris*, if after the death of her husband she do enter into the lands so assign-

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(1) See Co. Lit. 35 b.—Ed.

(2) Gorge's case.—Ed.



ed unto her, she is thereby by her agreement concluded, to claim any dower at the common law. 4 Co. fo. 1 b. (1) 9 Co. 79 b. (2). And therefore it behoveth her to be wary, and well advised in such cases, for peradventure those dowers made *ad ostium ecclesiæ* be of lesser yearly value; and therefore if she will, she may, after the death of her husband, refuse such endowments *ad ostium ecclesiæ*; then she may be endowed according to the course of the common law, for *uxor jure Anglicano in potestate*, or *sub virgâ viri est sui*. Bract. li. 1. cap. 10. fo. 6. 'Cowell's Inst. li. 1. tit. 10. And it is commonly said, that a *femme covert* hath no will, for after marriage all the will of the wife in judgment of the law is subject to the will of her husband (4 Co. 61.) (3), and she by her marriage hath put her countermanding power in the mouth of her husband, as it is said, 5 Co. 10 b. And therefore by the law she is protected, so that the husband during the espousals cannot prejudice her, touching her inheritance or freehold.

If the husband and wife be, and lands be conveyed unto them, and unto the heirs of the husband, the husband dieth, and the wife brought a writ of dower before any agreement made after the death of the husband, in this case she shall have her dower, for she shall not be compelled to take by the purchase immediately against her will, and she had not any time to disagree unto it before the death of her husband; and the using of the writ is a disagreement to take it according to the purchase, the which disagreement shall relate to the time of the first purchase. Perk. 69 b. [s. 352.] .

So if lands be given to the husband and the wife, and to the heirs of the husband, or unto the heirs of their two bodies, or unto their heirs, and after the husband dieth; now if she will waive and refuse the joint estate, she may bring her writ of dower, and by it in judgment of law the husband shall be said to be sole seised *ab initio*, for that otherwise the wife could not be endowed: and yet in verity the husband and wife were joint-tenants during all the coverture, but now the refusal shall have such relation, that in judgment of law the husband was sole seised *ab initio*. 3 Co. 27 b. (4).

§ 42. And note, that no wife shall be endowed *ex assensu patris* in form aforesaid, but where her husband is son and heir ap-

(1) Vernon's case.—Ed.

(2) Peytoe's case.—Ed.

(3) Forse and Hembling's case.—Ed.

(4) Butler and Baker's case — Ed.

parent to his father. *Quære* of these two cases of dowment *ad ostium ecclesiæ*, &c. if the wife, at the time of the death of her husband, be not past the age of nine years, whether she shall have dower or no.

Here two things are mentioned, the first is explained in the 40th section, and for the other that Littleton maketh a doubt of, it seemeth that both the cases of dowment *ad ostium ecclesiæ* shall be in the same case, (as unto the age to have dower), as the wife that is to claim her dower of the third part by the order of the common law.

\*§ 43. And note, that in all cases, where the certainty appeareth what lands or tenements the wife shall have for her dower, there the wife may enter after the death of her husband without assignment of any. But where the certainty appears not, as to be endowed of the third part, to have in severalty, or the moiety according to the custom, to hold in severalty, in such cases it behoveth that her dower be assigned unto her after the death of her husband; because it doth not appear before assignment, what part of the lands or tenements she shall have for her dower.

In what cases the wife may enter after the death of her husband, and in what not, till it be assigned unto her, doth well appear by the 39th section, and in this section; for, in the first it is said, if she be endowed of the moiety, or less part, and do express the quantity in certainty which, or in a certainty, what lesser or other part, she may enter. But in this section it is said, that if she be endowed of the moiety of the third part, to have in severalty, and do not express which part, or which moiety, by special name in certainty, as by bounds and abutments, then she may not enter till assignment be made unto her, and the reason of the difference is apparent.

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§ 44. But if there be two joint tenants of certain land in fee, and the one alieneth that which belongeth to him, to another in fee,

who taketh a wife, and after dieth; in this case, the wife for her dower shall have the third part of the moiety which her husband purchased, to hold in common (as her part amounteth) with the heir of her husband, and with the other joint tenant, which did not alien: for that in this case her dower cannot be assigned by metes and bounds.

Although it be said in the beginning of this chapter, that the woman shall have her dower by metes and bounds, yet that is to be understood, in case where the husband was sole seised, and of such things whereof division might be made; but here, where the estate of the husband was in common with others, or in such other case, where the thing cannot be divided, as of an office, or of a mill, or of a villain in gross, in these and like cases she shall be endowed; and in this case, but of the third part of the moiety, and not by metes and bounds. *Perk.* 67. [*s.* 342.] *F. N. B.* 149. 11 *Co.* 25*b.* *The case of Dower of Mill in the County of Hertford.*

§ 45. And it is to be understood, that the wife shall not be endowed of lands or tenements which her husband holdeth jointly with another at the time of his death; but where he holdeth in common, otherwise it is, as in the case next abovesaid.

The reason of this case is apparent, as well by the premises, as by that is written in the Chapter of Joint-Tenants, and the law herein is confirmed by divers authorities. *F. N. B.* 150*R.* and therefore it is commonly put in use purposely to prevent the wife of any purchaser, of any dower; sometimes because his meaning is to sell it, and sometimes because it may accrue clearly unto the surviving joint-tenants.

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§ 46. And it is to be understood, that if tenant in tail endoweth his wife at the church door, as is aforesaid, this shall little or nothing at all avail the wife; for that, after the decease of her husband, the issue in tail may enter upon her possession; and so may he in the reversion, if there be no issue in tail then alive.

This case doth but explain that which was before touched, *sect. 39*, viz. that dower *ad ostium ecclesiæ* must be out of an estate in fee simple, and not in tail, for the statute of Westm. 2. cap. 1. doth preserve the estate tail; and in the like case the maxim of *possessio fratris*, *sect. 8.* and that other of bastard *eignè et mulier puisnè*, *sect. 399.* are proper only to fee simple. *Plowd. 57 a.*

§ 47. Also, if a man seised in fee simple being within age, endoweth his wife at the monastery or church door, and dieth, and his wife enter; in this case, the heir of the husband may oust her. But otherwise it is (as it seemeth) where the father is seised in fee, and the son within age endoweth his wife *ex assensu patris*, the father being then of full age.

Concerning that the husband must be of full age when he doth assign dower to his wife *ad ostium ecclesiæ*, [is before expressed and explained upon the 39th sect. But here is a special exception, in case where the dower *ad ostium ecclesiæ* [is] *ex assensu patris*, for seeing the land must move from the father it sufficeth if he be of full age, though the son, who maketh such dowment, be then within age.

§ 48. Also, there is another dower, which is called dowment *de la plus belle*. And this is in case where a man is seised of forty acres of land, and he holdeth twenty acres of the said forty acres of one, by knight's service, and the other twenty acres of another, in socage, and taketh wife, and hath issue a son, and dieth, his son being within the age of fourteen years; and the lord of whom the land is holden by knight's service, entereth into the twenty acres holden of him, and holdeth them as guardian in chivalry during the nonage of the infant, and the mother of the infant entereth into the residue, and occupieth it as guardian in socage: if in this case the wife bringeth a writ of dower against the guardian in chivalry, to be endowed of the tenements holden by knight's service, in the king's court, or other court, the guardian in chivalry may plead in such

case all this matter, and show how the wife is guardian in socage, as aforesaid; and pray that it may be adjudged by the court, that the wife may endow herself *de la plus belle*, i. e. of the most fair of the tenements which she hath as guardian in socage, after the value of the third part which she claims by her writ of dower to have the tenements holden by knight's service. And if the wife cannot gainsay this, then the judgment shall be given, that the guardian in chivalry shall hold the lands holden of him during the nonage of the infant, quit from the woman, &c.

§ 49. And note, that after such a judgment given, the wife may take her neighbours, and, in their presence, endow herself, by metes and bounds, of the fairest part of the tenements which she hath as guardian in socage, to have and to hold to her for term of her life; and this dower is called *dower de la plus belle*.

§ 50. And note, that such dowment cannot be but where a judgment is given in the king's court, or in some other court, &c. and this is for the preservation of the estate of the guardian in chivalry during the nonage of the infant.

Concerning the explaining of this dower *de la plus beale*, read with it Perkins, whereof he hath written very exactly, *fo.* 88. First, this is only in case where the demandant in dower is guardian in socage of one moiety, or at least of so much as out of it she may have her third part of all. Also, where she doth bring her writ against the guardian in chivalry; for the lord by escheat, the heir, or the feoffee, cannot plead this plea to a woman demandant in writ of dower.—*Perk.* 88.—45 *E.* 3. 6 *a.* for this manner of dower is peculiar for the special advantage of the lord, as it is said, 14 *H.* 7. 26 *a.*, agreeable to Lit. sect. 50.

Secondly, the demandant must be a rightful guardian in socage, and not a guardian by her own wrong.—5 *Co.* 31 *a.* Note, if she have title of dower, and do disseise the ter-tenant, she cannot endow herself by retainer.—*Ibid.* In the only case of dower, a *præcipe* lieth against guardian in chivalry, that hath but a chattel, and no frank-tenement; for this writ of dower against guardian in chivalry is not like to any other *præcipe*. 9 *Co.* 17 *a.* And this is for very necessity, for otherwise the demandant were without remedy, for she might not have a writ of dower against the heir in ward, as

it is adjudged, because of the prejudice that might be thereby to the guardian; and no writ of dower lieth against the guardian in socage. 6 Co. 57 b. And note more at large, 9 Co. 16 b, 17 a, where it appeareth, that this writ of dower lieth against guardian in chivalry, only during the minority of the heir, and during his minority the guardian may endow her without any suit if he will; but after his full age, although he hold over the land for the value of the marriage, no writ of dower lieth against him, neither can he endow the wife, because that after his full age he is no more guardian; for he must be guardian, and named guardian. Also, it appeareth within this case, that a writ of dower may be brought as well in the courts of other lords, as in the king's court. *Fitz. N. B.* 148 b.

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§ 51. And so you may see five kinds of dower, viz. dower by the common law, dower by the custom, dower *ad ostium ecclesiæ*, dower *ex assensu patris*, and dower *de la plus belle*.

Also, it appeareth that this judgment and dower lasteth no longer than the nonage of the heir that is in ward. *Fitz. N. B.* 148.—45 E. 3. 6 a.

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§ 52. And *memorandum*, that in every case where a man taketh a wife seised of such an estate of tenements, &c. as the issue which he hath by his wife may by possibility inherit the same tenements of such an estate as the wife hath, as heir to the wife; in this case, after the decease of the wife, he shall have the same tenements by the curtesy of England, but otherwise not.

This is a rule more than is before spoken of concerning the state of tenant by the curtesy; for although all other incidents be completed, yet if there be not any possibility that the issue, that they may have between them, may inherit the same land, and also the estate which the wife had, as heir unto the wife, he shall not be tenant by the curtesy. *Old N. B.* 147 b. But if a woman be tenant in special tail, with a reversion expectant to her and to her heirs, her first husband dieth without issue, and she taketh another husband, and hath issue by him, he shall be tenant by the curtesy, for now the particular estate, being tenant in tail after the possibility of issue ex-

tinct, is drowned, and she is only seised of the last entail or fee simple, which was expectant, of which estate their issue may by possibility inherit. 9 E. 4. 18. as before is shewed in the chapter of *Tenant in Tail after Possibility of Issue Extinct*.

§ 53. And also, in every case where a woman taketh a husband seised of such an estate in tenements, &c. so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenements of such an estate as the husband hath, as heir to the husband, of such tenements she shall have her dower, and otherwise not. For if tenements be given to a man, and to the heirs which he shall beget of the body of his wife, in this case the wife hath nothing in the tenements, and the husband hath an estate but as donee in special tail. Yet if the husband die without issue, the same wife shall be endowed of the same tenements; because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife dieth, living her husband, and after the husband takes another wife, and dieth, his second wife shall not be endowed in this case, for the reason aforesaid.

The like rule here also is put in the case of dower; for though in case the having of issue is not necessary, yet if there be no possibility that the issue, if they have any, can inherit the same estate, whereof her husband was seised during the coverture, though peradventure the issue is inheritable to the same lands, but of another estate, yet she is not dowable. And to exemplify this, these cases may suffice; tenant in tail general maketh a feoffment, and taketh especial tail, his first wife dieth, he taketh another wife, he dieth, his second wife shall not be endowed. 41 E. 3. 30. 46 E. 3. 24. 21 E. 4. 22 a.

And where the estate which the husband had during the espousals is determined, then the wife shall lose her dower; for if tenant in tail discontinue in fee, and after taketh wife, and disseiseth the discontinuee; or if the discontinuee doth enfeof him, and after the tenant in tail dieth seised; now the heir is remitted, and the wife shall lose her dower; because of the heir being in of another estate

of inheritance than the husband had during the espousals. And so if a man have title of action to recover any land, and after he doth enter, and disseise the tenant of the land, and die seised, by which his heir doth enter; now the heir is remitted to the title which his ancestor had, but the wife of the husband who died seised, shall lose her dower; for the estate which her husband had is determined; for that was an estate in fee by wrong, and the heir hath the estate which was in the ancestor by right.

If a man make a gift in tail, reserving a rent to him and to his heirs, and after the donor hath a wife, and dieth, and the tenant in tail also dieth without issue; now the wife of the donor shall not be endowed of the rent, because the rent is extinct, for it was reserved upon an estate tail, which is determined; but although the donor tenant in tail dieth without issue, yet the wife shall be endowed, because the land doth continue, and is not determined, as the rent is; the rule is, *cessante statu primitivo cessat et derivativus*. And where this rule doth hold, and where not, *vide* 8 Co. 34 a. And if the grandfather die seised, and after the father do die seised, and the son have the land, and after the wife of the grandfather is endowed of the third part, and after dieth, yet the wife of the father shall not have dower of that third part, for *dos de dote peti non debet*. *Fitz. N. B.* 149. *R. G. H.* *Perk.* 62. 4 Co. 122 b.—Lands are given to the husband and the wife in special tail, the remainder to another in tail, the remainder to the right heir of the husband, the wife dieth living him in the remainder, the second wife shall be endowed of this land. 46 E. 3. 16.

§ 54. Note, if a man be seised of certain lands, and taketh wife, and after alieneth the same land with warranty, and after the feoffor and feoffee die, and the wife of the feoffor bring an action of dower against the issue of the feoffee, and he vouch the heir of the feoffor, and hanging the voucher and undetermined, the wife of the feoffee brings her action of dower against the heir of the feoffee, and demand the third part of that whereof her husband was seised, and will not demand the third part of these two parts of which her husband was seised: it was adjudged, that she should have no judgment until such time as the other plea were determined.

This case is evident in itself, for the rule is, *qui prior est tempore, potior est jure*. 4 Co. 90 a. And *summa justitia est suum cuique*



*tribuere*. And if the wife of the feoffor die after she have recovered her dower, during the life of the wife of the feoffee, then shall [the wife of the feoffee] be endowed of those lands which the wife of the feoffor had so recovered; for the diversity is between dower which a woman hath from her husband, as he was an heir, and of a purchaser in the like case; for if grandfather, father, and son be, the grandfather dieth seised, and after the father dieth, and the son doth endow the wife of the father, against whom the wife of the grandfather doth bring dower, and recovereth, and after the wife of the grandfather dieth, the wife of the father shall not be endowed of the part assigned to the grandmother for her dower, for now in judgment of law the father never had but a reversion. Then the wife of the feoffee may not by the law be endowed of a reversion expectant upon a frank-tenement, and therefore *dos de dote peti non debet*. But otherwise it is, where dower is recovered against a purchaser, his heirs or assigns; for dower doth take away the estate which by the law doth descend, but not estate gained by purchase. 4 Co. 122. [5 E. 3.] *Voucher*, 249. *Perk.* 62b. And her estate of dower is *quodammodo* a continuance of her husband's estate. 7 Co. 9. *Dyer*, (1), 87. 8 *Ass. pl.* 6. *Descents*, 19 a, *Brooke*. 7 H. 5. 3.

§ 55. And note, Vavisor saith, that if a man be seised of land and committeth felony, and after alieneth, and after is attaint, the wife shall have a good action of dower against the feoffee: but if it be escheated to the king, or to the lord, she shall not have a writ of dower. And so see the difference, and inquire what the law is herein.

For the understanding of this section it is to be observed, that by the order of the common law, the wife of a man attaint of felony should not be endowed of the lands of her husband so attaint. *Sect.* 747, where the reason thereof is shewed, and in *Stamf. lib.* 3. *cap.* 33. But if the felon die before attainder, his lands are not forfeited, nor his wife's title of dower. But if after the felony committed, and before attainder, he do alien all or part of his lands, this did not prevent the forfeiture of her dower, (as this case is); for

(1) I have not been able to meet with any case in *Dyer's Reports*, to this effect.—Ed.

the attainder subsequent shall have relation unto the time of the felony committed, which was before his alienation, in cases concerning his lands and tenements. *Stamf. cap. 31.*

Then this case being put as the common law was, when she doth bring a writ of dower against the alienee or feoffee, he had nothing to plead in bar of her action, but only the attainder of her husband, which if he did, he thereby shall disclose sufficient matter against himself touching the forfeiture of his inheritance, which because he will not do, therefore it is said that she shall recover her dower against the feoffee (1). But if the land be escheated to the king, or other lord, she could have no title of dower by the common law. But at this day this point of the common law is changed in favor of womens dower, that is to say, as unto felony. But in case of treason (2), the common law is as before, as by the statute made in 1 E. 6. c. 2, and by the other statutes 5 et 6 E. 6. cap. 11, may appear; and the wife doth not lose her dower, though her husband do commit felony, and is thereof attainted, whether he do alien his lands after the coverture before the felony committed, or after, or if he continue his seisin or possession even until his death. *Dyer, 140 b.*

Note, there was no jointure made to women to bar dower before the statute of 27 H. 8. cap. 10. 4 Co. fo. 1 b.

## LIB. I. CAP. VI. TENANT FOR TERM OF LIFE.

§ 56. Tenant for term of life is, where a man letteth lands or tenements to another for term of the life of the lessee, or for term of the life of another man. In this case, the lessee is tenant for term of life. But by common speech, he which holdeth for term of his own life, is called tenant for term of his life; and he which holdeth for term of another's life, is called tenant for term of another man's life.

Note, that, in the law there is a death called *mors civilis*, besides that of *mors naturalis*, which was the cause, that when a lease for life was made, always the *habendum* was, to have and to hold to him.

(1) But see Co. Lit. 41 a, and Hargrave's note thereon, where this MS. is cited.—Ed.

(2) Et Petit treason. *Stamf. 195.* Note in MS.

*durante vitâ suâ naturali*, for it was anciently taken, that if the *habendum* had been general, *durante vitâ suâ*, without saying *naturali*, the civil death, that is to say, entering into religion, had ended it. 2 Co. 48 b.

Although the estates of tenant in tail after possibility of issue extinct, and tenant by the curtesy, and tenant in dower, are but estates for life, (as in their several chapters may appear), yet Littleton in this chapter doth only entitle it, "Tenant for Term of Life;" for those others took their several names and appellations; the first in respect of his original estate, which was inheritance in tail; the other two in regard of their effects. And there is to be observed divers diversities between them; for tenant in tail after possibility is not punishable for waste done by him in the lands, tenements, or houses, as the other more particular tenants for life are. Also the common law, which did create the estate of tenant by the curtesy, and dower, did provide and prohibit them, that they should not commit waste to the disinheritation of them in reversion, and thereupon a prohibition and an attachment did lie against them, *lex nulli facit injuriam*; but at the common law no remedy there was either for voluntary or permissive waste, against lessee for life or years, because such lessees have interest in the land by the act of the lessor, whose folly it was to make such leases for one who is for the same to do him fealty, and did not restrain him by covenant, condition, or otherwise, that he should not do waste, or provide in that behalf by exception. 4 Co. 62 b. 5 Co. 13 b. See sect. 67. *Volenti non fit injuria, et vigilantibus et non dormientibus jura subveniunt*. Also at this day, and after the making of the general statute at Gloucester, cap. 5, anno 6 E. 1, against waste committed by any particular tenant, when a writ of waste is brought against tenant in dower, or by the curtesy, who were prohibited by the common law, the writ shall not rehearse the statute; but if a writ of waste be brought against tenant for life or years, it shall rehearse the statute. F. N. B. 55. C. D.; also the writ of waste shall be always brought against tenant in dower or by the curtesy, although they have granted over their estates unto others who did the waste. F. N. B. 55. E. But lessee for life or years shall not be punished for waste done by an assignee. F. N. B. 56. A.

In the beginning of this chapter is shewed, that whether the lease be made for term of life of the lessee himself, or for term of another man's life or lives, in both cases the lessee is tenant for term of life. But sometimes the law doth pronounce the estate to be for life,

where the words are not expressly for life, or for term of another man's life, as sect. 381 : if a lease be made to the baron and femme during coverture, by these words they have estate for term of their lives, which he proveth thus ; every man that hath any estate in lands which is a frank-tenement, either he hath fee simple, fee tail, for term of his own life, or for another man's life, but in this the husband and the wife by such form of grant have not fee, nor fee tail, nor for term of another's life, *ergo*, they have estates for their own lives. So if an abbot or bishop, do make a lease to a man *habendum* to him during the time the lessor is abbot, in this case the lessee hath estate for the term of his own life, though upon condition in law.—37 H. 6. 27. . So if a lease be made *habendum quamdiu sola vixerit*, or *durante viduitate*, it is an estate for life of the lessee ; and therefore upon the statute of 27 H. 8. c. 10, for the jointure of women, two of the last of the five examples (for the form) are in these words, viz. to the husband and the wife for their lives, unto the husband and wife for the life of the wife. It hath been resolved, that an estate made *habendum durante viduitate sua aut quamdiu sola et casta vixerit*, is a good jointure for term of her life. 4 Co. 3 a. 4 Co. 30 a.

If a man by his deed grant a rent of 10*l.* issuing and payable out of all his lands quarterly, at the usual feasts, and for the non-payment to distrain for the rent, and all the arrearage ; in this case the grantee shall have the rent for his own life, without limitation of any estate ; for by the delivery of the deed *tantum* the freehold doth pass in the case of a common person ; and the reason is, because every man's grant shall be taken strongest against himself. 17 E. 3, 45 a. *Sir John Davies*, 45 a. And so in a devise. 8 Co. 96.

In some cases there may appear a diversity between these limitations, though both are but one frank-tenement ; for if a man make a lease for life, and confirm this estate for the remainder to another, and his heirs, this remainder is void ; for by the law there may no remainder depend upon any particular estate, but when the same estate doth begin at the same time that the remainder doth. But if a lease be made to a man for the term of another man's life, and after the lessor doth confirm the estate of the lessee to have for his own life, the remainder in fee, this is a good remainder. *Dr. et Stud. li. 1. cap. 20. Bro. Estates, 80. See Pollard's opinion in Plowd. 25 b. Litt. s. 573.* Tenant for his own life exchangeth for another's life, it is no good exchange. *Perk. 55.* If a lease

be made to one for term of another's life, without impeachment of waste, the remainder to him for his own life, now he is punishable for waste; for the first estate is drowned, and gone; and so it is of a confirmation. 11 Co. 83 b. *Dyer*, 10 b; where it is said, that in *omni majore includitur minus*.

Also, the statute of 27 H. 8. cap. 10, doth amongst other things provide for the jointure of women after the death of the husband for their lives. But if the husband do make a feoffment to the use of his wife *pur auter vie* or *vies* for jointure, it is not within the intent of that statute; 4 Co. 3 a; and there see the reason: but leases *pur autre vie* are good, and within the statute of 32 H. 8. cap. 28, concerning leases made by tenant in tail. *Vide* 6 Co. 37 b.

Littleton sheweth, that by common speech he that doth hold for term of his own life, is called tenant for term of his life; and he who holdeth for term of another's life is called tenant for term of another's life; and so pursues them the next section, teaching that [it] becometh a student in the law to use the proper words of art best known to the law, and not others which are dissonant from the lawyer's dialect. *See Co. to the reader before the 7 Report*, 2 a.

And therefore sect. 324, he saith, "where a man will show a feoffment made unto him, or a gift in the tail, or a lease for term of lands or tenements, there he must say, by the force of which feoffment, gift, or lease, he was seised, &c.; but where he will plead a lease or grant made unto him of chattels reals or personals, there he must say by force whereof he was possessed;" also in real actions there is demandant and tenant, in personal actions they are called plaintiffs and defendants. *Finch*, 50 a.

When a lease is made to a man for term of his own life, or for term *d'auter vie*, the lessee is tenant for term of life, respectively. So one man may be tenant at one time, both for his own life, and for term of another's life; for if a lease be made to A., and his assigns, *habendum* during his life and the life of B. and C., it hath been adjudged that this limitation was good, and there was no merging of estates in this case; as in cases where a man hath two estates in one thing, the one lesser, the other greater; for in this case the lessee hath but one estate of freehold, with the limitation, which shall continue during those three lives, and the survivor of them (1). 5 Co. 13 a, *Rosse's case*.

(1) See Co. Lit. 41 b.—Ed.

There is *mors civilis* and *mors naturalis*, which was the cause, that when a lease for life was made, always the *habendum* was to have and to hold to him *durante vitâ suâ naturali*; for it was then taken that if the *habendum* had been general, *durante vitâ suâ*, without saying *naturali*, the civil death, that is to say, entering into religion, had determined it. 2 Co. 48 b.

§ 57. And it is to be understood, that there is feoffor and feoffee, donor and donee, lessor and lessee. Feoffor is properly where a man enfeoffs another in any lands or tenements in fee simple: he which maketh the feoffment is called the feoffor, and he to whom the feoffment is made is called the feoffee. And the donor is properly where a man giveth certain lands or tenements to another in tail: he which maketh the gift is called the donor, and he to whom the gift is made, is called the donee. And the lessor is properly where a man letteth to another, lands or tenements for term of life, or for term of years, or to hold at will: he which maketh the lease is called lessor, and he to whom the lease is made, is called lessee. And every one which hath an estate in any lands or tenements for term of his own or another man's life, is called tenant of freehold, and none other of a lesser estate can have a freehold: but they of a greater estate have a freehold; for he in fee simple hath a freehold, and tenant in tail hath a freehold, &c.

But by the second section in this chapter we must learn, that to all contracts it is necessary that there be two parties, the feoffor and the feoffee. *Dyer*, 49 a, &c. And this is the reason why a franktenement, and a livery, cannot take effect *in futuro*; for the feoffor should have in the mean time a particular estate, without a lessor; and the same law and reason is there of a rent *in esse*, and of a reversion. *Vide Plowd.* 155 b, 197 a. 5 Co. 94 b. And therefore it is also that a man cannot give any thing to his wife, no more than one hand may be said to give to another; for a man and his wife are but one person in law, as appeareth hereafter in the title of Burgage, and 13 H. 8, 12 b. And upon this reason it was, that a late practice made of leases to the queen by colleges, deans and

chapters, guardians of hospitalry, or by any other having spiritual livings, against the provision of the stat. 13 *Eliz. cap. 10*, are void. 5 *Co. 14*, *vide librum, first part*. 11 *Co. 67*, *Magdalen College case, in Cambridge*.

And upon this reason is the case put by Catlyn, Chief Justice, in the Star-chamber, that if an infant *femme coverte*, or other levy a fine *sur grant et render* in tail, or for life, the baron dieth, the wife nor the infant shall not have, a writ of error during their nonages; because they are tenants of the lands, and may not have brief of error against themselves; *et sic in hoc casu*, the infant is without any remedy, *quod nota*, a very great mischief. *Crompton's Courts*, 37 *a*, s. 661.

And upon the same reason note the opinion of Cholmeley, Chief Baron, *Plowd. 37 a*, that no man shall be said lawfully to be in prison, or in ward, without a gaoler or keeper; as if a woman be guardian of a prison, as the Fleet, and a prisoner in execution there doth marry the woman, this shall be adjudged an escape in the woman, and the law shall adjudge the prisoner to be at large; for he cannot be a prisoner lawfully, but under a keeper, and he cannot be under the custody of his wife; and so he saith if the guardian of the Fleet, who hath his office in fee, dieth, and his son and heir then being prisoner in execution, the office doth descend to him, now the law shall adjudge him out of prison, although that he hath fetters upon his heels, because he cannot keep himself in prison. 3 *Co. 72 a*.

Although all men are parties in a statute, or in an act of parliament, yet in judgment of law the land doth move from him that is thereof seised; for example, if a man make a feoffment to the use of another in tail, the use is translated into possession by the stat. 27 *H. 8. cap. 10*; and yet he that was owner of the land, and from whom the land did move, shall be said the donor. 1 *Co. 47 b*. 6 *Co. 68*. *Bro. Formedon*, 46. *Vide librum*.

Yet in special causes a man may be tenant in tail, and no donor. 15 *H. 7. 6*, by *Keble. Dyer*, 154. Where the tenant of the Archbishop of Canterbury made a gift in tail, the remainder to the king in fee, the donee doth hold of none. 9 *Co. 92 b*.

And in several cases, and in several respects, a man may be both agent and patient, according to the saying, *quando duo jura continentur in una persona, æquum est ac si esset in diversis*, as a man may vouch himself for the saving of the tail: 5 *H. 7. 24*. 10 *H. 7. 2*. pray in aid of himself, where the debtor maketh the debtee his

executor. 8 Co. 133, *vide librum*, (but executor of his own wrong shall not retain) 5 Co. 30 b. So if an executor, or an administrator, do pay of his own proper goods to the value of the plate or other goods in his hands, being as executor, the property of the plate is already in him without a donor, or other party; adjudged. *Plowd.* 185, *et seq.* *Keilw.* 26 a. 20 H. 7. 2 et 4. *Dyer*, 2. If a dean be lord of a manor, and he purchaseth a tenancy thereof, to him and to his heirs, now he is tenant unto himself, and he and his chapter shall avow upon himself; so if the lord in the right of his wife doth purchase the tenancy, he is now tenant to himself. 13 H. 8. 14 a. *Pollard*.

And in the title of Dower in this book, we read, that a woman may endow herself *de la plus beale partie*, without the assignment of any other; but that is by a judgment first given, whereby the nature of the thing is altered and changed by the judgment of court, which indeed is an act; and no alteration of the possession was requisite, as you may read in *Keilway*, last mentioned; and see *Sir John Davies*, 82 a, this case with other vouched to prove that sometimes, and in special cases, the law doth dispense with formalities. *Trowick* saith, 12 H. 7. 28 a, that in every gift of necessity it is, that there be one able person to accept it, otherwise the gift cannot be good, viz. either by a name of inheritance known to the law, or by a name corporate; therefore a gift of lands made to the parishioners of Dale is [not] good, for that that name is not known, for it is not certain; if a lease for years be made, the remainder to the right heirs of J. S., the limitation of the remainder is void; for otherwise hereby the frank-tenement should be in suspense, which the law will not suffer, but doth abhor the suspense of a freehold, as *natura abhorret vacuum*. *Sir John Davies*, 34.

And to conclude this chapter, it is here shewed, that an estate for life is a frank-tenement, though the least of estates of frank-tenements; but a lease for term of life, because it is a freehold in judgment of law, is greater, and of higher nature, than any lease for years, though it be for 1000 years or longer. *Plowd.* 120 b. 5 Co. 81 b. 8 Co. 70 a.

A *præcipe quod reddat* lieth against a tenant of the freehold, and not against lessee for years, or any other who hath but a chattel real; neither can the freehold be recovered against him that hath but a chattel, for he cannot render a freehold, that hath not a frank-tenement. 8 Co. 95 b. And a special case of dower, which is against guardian in chivalry, which is mentioned 6 Co. 57, is excepted, which see before, in title of Dower.



But at the common law a recovery against tenant for life with a voucher upon a true warranty, and recovery in value, did bind him in the remainder, as the books be cited 10 Co. 43 b. And the reason is because the particular estate, and the estate in remainder, be but only one estate, and a warranty may extend unto both of them, and therefore [the recompence in value shall enure to both the estates.] *Ibid.*

But a common recovery against tenant for life only, is a forfeiture of his estate, because a common recovery is now but a common assurance and conveyance; and a diversity was taken between a recovery by assent, which is in nature of a common conveyance, and a recovery without assent of the parties, although such recovery against such particular tenant be without title. 1 Co. 15 b. 10 Co. 44 a.

And the foundation of all common recoveries to dock estates tail is, to be certain that a writ of entry in the post is brought against the tenant of the freehold. 3 Co. 6. 2 Co. 77 a. And the common assurance at this day is, that tenant in tail of lands with remainder over shall bargain and sell the land by deed indented and inrolled (according to the statute) unto another, against whom the writ of entry in the post is brought, and he must vouch the tenant in tail, and he must vouch over; and yet the bargainee in this case hath but one estate determinable upon the life of tenant in tail. 10 Co. 45 b. See *Manxell's case*, *Plowd.* 8 a. Great was the power of tenant for life at the common law over the land, because he is tenant of the freehold: *Litt. s.* 481. *fo.* 112 b. if tenant for life, the remainder over in fee, had suffered a recovery, he in the remainder was without remedy before the statute of Westm. 2. cap. 3. And the reason of the strictness of the common law in such case was, to take away multiplicity and infiniteness of suits, trials, and judgments in one same case; and therefore in the judgment and policy of the law, it was thought more profitable to the commonwealth, and more for the honor of the law, to leave some without remedy, than that there should not be any ends of actions and suits. 6 Co. 8 b. And before the statute 32 H. 8. cap. 31, many great inconveniences might be come to those in remainder and reversion by the act of tenant for life, for suffering a common recovery, and yet remedy was not fully provided before the statute 14 Eliz. cap. 8.

Erroneous judgment given against tenant for life; by this the reversion or remainder was devested, so that they may not grant or

transfer their interest to another by any means; and also doubted, that they might not punish any waste done after the recovery; for remedy whereof by the statute 9 R. 2. cap. 3. it was provided, that in such cases they in reversion or remainder, their heirs and successors, may have attaint or writ of error, as well in the life of the tenant, as after his death, as by the same more at large doth appear. 3 Co. 4 b.

Note, 33 & 34 Eliz. it hath been adjudged, if tenant for life levy a fine with proclamations, and five years pass in his life, the lessor shall have five years more to make his claim after the death of the lessee, although the statute of 4 H. 7. 24. of fines, hath saving for the lessor in that case: yet the saving is of such right as shall grow and remain, &c.; and then in this case the right did first accrue to the lessor after the fine to enter for the forfeiture, and therefore the lessor was out of the words of the statute; nevertheless forasmuch as by the covin of the lessee, he in the reversion or remainder might be barred of their interest, for they would not expect to enter until the death of the lessee, the lessor shall have five years after the death of the lessee. And so it is if tenant for life doth make a feoffment, who levieth a fine, &c.; and so in this case the Judges have made construction against the letter of the statute, for the saving of the estate and inheritance of them in reversion. 3 Co. 58 b. *Plowd.* 373 b. Note a diversity, in 9 Co. 135 b. *Et quære legem.*

If a woman do not claim her dower within five years after the death of her husband, she shall be barred by the only fine of her husband with proclamations made according to the statute 4 H. 7. cap. 24. *Quod vide in Dyer*, 224. 2 Co. 93 a. *Plowd.* 353. 8 Co. 72 b.

Before the statute of Gloucester, cap. 3, and the statute 11 H. 7. cap. 20, a release with warranty of tenant by the curtesy, or of tenant in dower, or tenant for life made to the disseisor, was a collateral warranty by the common law, and did bind the heirs, but this is to be understood when there was no covin or collusion to make disseisins. But after disseisins made without covin, there such a release in the case of tenant by the curtesy, or husband seised in the right of his wife, before the statute of Gloucester, or of the tenant in dower or in jointure before the statute of 11 H. 7. was a bar, as a release with warranty by another tenant for life at this day is. But a release at this day made to the disseisor, or to any without covin, and yet to the intent to bar them in reversion

or remainder, doth bar them, for intent without covin and disseisin doth not avoid the warranty: for if the father be tenant for life, and maketh a feoffment in fee with warranty, and dieth, this warranty shall bar the son, although it was made purposely to bar him; for there was not any disseisin, and therefore such warranty cannot be voided by averment of covin, because there was no disseisin in the case, for a warranty commencing by wrong shall not be avoided, but warranty commencing by disseisin. 5 Co. 80, *Fitzherbert's case*. Tenant for life, the remainder for life, the remainder in fee, the first tenant for life alieneth, the alienee levieth a fine, he in the remainder for life must enter, and not he in the remainder in fee; but if he will not enter, nor make claim within the year, he in the remainder or the reversion was bound at the common law; for the particular tenant, and they in the remainder, had all but one year after the fine levied, which mischief was the cause of the statute 34 E. 3. cap. 16, by which non-claim was taken away. *Plowd.* 359.

By the civil law, *finis longissimum vitæ hominum tempus est centum annorum*. 10 Co. 50 b. But in 11 Co. 28 a, it is said, that in Wiltshire one John Shewter was 115 years old at the time of his death.

*Nota*, by provisos wisely invented and put in indentures, tenant for life hath power to make leases for twenty-one years, or for other time, to continue after the estate of the lessor. 5 Co. 6 b. But if one have power to make a lease for three lives, he cannot make a lease for certain years determinable upon three lives. *Per curiam*, 8 Co. 70 b. And *ibidem* a diversity was agreed between a particular power affirmative, and a general power restrained with a negative.

## LIB. I. CAP. VII.—TENANT FOR TERM OF YEARS.

§ 58. Tenant for term of years is, where a man letteth lands or tenements to another for term of certain years, after the number of years that is accorded between the lessor and the lessee. And when the lessee entereth by force of the lease, then is he tenant for term of years; and if the lessor in such case reserve to him a yearly rent upon such lease, he may choose for to distrain for the rent in the tenements let, or else he may have an action of debt for the arrearages against the lessee. But in such case it behoveth, that the lessor be

seised in the same tenements at the time of his lease; for it is a good plea for the lessee to say, that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, in which case such plea lieth not for the lessee to plead.

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The author having declared the law in the precedent chapter concerning estates of inheritance and freeholds in lands and tenements, now doth treat of the lesser estates, namely, of tenant for term of years, wherein is another course than in the former estates of inheritance; for they after the death of the owner shall descend to the heirs: but if the lessee for years die, the heirs of the grantee or lessee shall not have it, because it is but a chattel real, and chattels real or personal, by the common law, shall go unto the executors of the grantee or lessee, and not unto the heir, *sect. 740*; except in special cases. And that which is here taught concerning tenant for term of years is with diligence to be observed; for it doth concern in effect every man; [for], for the most part, every one is a lessor or lessee, as it is said, *3 Co. 23 a.*

And it is to be known, that at the common law the imbecility and exility of the term for years was such, that it was subject and under the power of the tenant of the frank-tenement; for tenant for years at the common law could not prejudice, or draw in question, the estate of the freehold; for though the recovery against the tenant of the freehold were by agreement, the tenant for years could not be received before the statute of Gloucester, nor falsify a recovery at the common law against a tenant of the freehold, because he hath but a chattel; wherefore the statute of the 21 H. 8. cap. 15, was made for the preservation of the interest of lessee for years: and although a common recovery against a tenant of the freehold be by agreement, yet tenant for years might not be received before the statute of Gloucester, cap. 11, because of the feebleness of his estate. *6 Co. 57 a. 9 Co. 135 a. Keilw. 109 a.*

The author in this section doth teach many several points to be observed; first, that the subject-matter whereupon a lease for years must consist, are lands and tenements, which are of a higher nature, and more notorious to the country than a lease [of] sheep, kine, or other chattels personal; for *ejectio firmæ* or *quare ejecit infra terminum* doth lie of a lease of lands, but not of a lease of chattels personal; and the defendant may wage his law in the latter case, but

not in the other, if an action of debt be brought for rent hereupon reserved. 1 *H. 6. 1 a. Ley in Fitz.* [1]. But it is holden, if a man do make a lease of a manor or other lands stored with beasts, reserving a rent, the defendant shall not wage his law for the rent due in regard of the beasts; for the lease of the manor and beasts make but one contract; and for the rent reserved upon the land, wager of law doth not lie; but if a man do demise beasts only, in debt for the rent reserved, the defendant may have his law.—1 *E. 4. 14. Fitz. tit. Ley, 25. Bro. 58.*

And therefore the principal case there was, that the plaintiff in an action of debt did declare upon an accord between him and the defendant, that the plaintiff should lease a chamber unto him for three years, paying 3*s.* weekly, and because the demise of the chamber was in the declaration, although peradventure no accord was made for the chamber, yet the defendant could not in that case wage his law, 7 *H. 7. 5*; for although the rent reserved was increased in respect of the stock, or other sum of money delivered, yet the whole rent doth not issue out of the stock, but only out of the lands: *Note 3 Co. 17 a*: therefore if all or the most part of the cattle die or perish, the rent nevertheless shall continue and not be apportioned; *contra Dyer, 56 a*; or if the lands demised be recovered by title from the lessee, yet the lessee may retain the stock till the end of the term, and pay no rent, contrary to the opinion 12 *H. 8. 11.*

A diversity was taken between a personal contract and a real contract; for if a man lease a stock of cattle, or of other goods, for years, rendering rent at several days, he shall not have an action of debt till all the days be past; so if a man make a single obligation or other contract to pay several sums at several days, he shall not have debt until all the time is incurred. But in case of a lease for years of land which is chattel real and a real contract, the lessor shall have an action after every day. 3 *Co. 22 a.* [5] *Co. 81 b.* 8 *Co. 153 a.* 10 *Co. 128 b.* *F. N. B. 267 b.*

Also, if a man do sell goods for money, to be paid at several days, in this case though the goods be reprised by one who hath right before the day, yet the vendor shall have debt in respect of the contract. But if a man make a lease for years, reserving a rent, if before the day incurred the land be evicted by a title paramount, the lessor shall not have an action of debt in respect of the contract, because this is a contract [real] and doth ensue the estate of the land, and the rent doth issue out of the land, and the person is not the debtor, but in respect of the land. 3 *Co. 22 a.*

And by the statute 32 H. 8. cap. 36, intituled, "An Act for the exposition of the statute of fines," a lease by fine may be made by tenant in tail for such number of years as he will, as by judgment, *Plowd.* 436, may appear.

It followeth also in this section, that when the lessee doth enter by force of the lease, then he is tenant for term of years, *quasi diceret*, and "not before his entry," which is true in certain cases; and therefore if a man do let tenements for years, by force of which the lessee is possessed, and the lessor by his deed doth grant the reversion to another for life, &c. it behoveth in this case that the lessee for term of years do attorn; by which it appeareth, before the lessee do enter, he hath not any possession, nor as it seemeth the lessor such a reversion, as he may grant it by the name of a reversion, so attornment should be necessary. And section 469, if a man do lease his lands for years, and the lessor do release unto the lessee all his right before the lessee have entered into the land, such a release is void, for want of privity. And in *Plowd.* 142 b, an action for debt was brought against lessee for years, for rent behind; the plaintiff did count that he did make the lease to begin at the feast of St. Michael next after the date of the deed; and it was holden by the court, that the suit was not maintainable, because the lessee had not entered, nor the lessor had not waived the possession, till which waiver or entry the lessor shall be adjudged occupier, and therefore shall not have any rent. But it is there said, if a man make a lease for years to commence presently, or at a day to come, before the lessee doth enter or the lessor do waive the possession, the lessee hath by the contract such a right that is grantable or forfeitable, though it be not executed, but executory as unto the possession: and therefore sect. 66, if a man let lands to another for term of years, and before the lessee enter the lessor dieth, yet the lessee may enter because he hath present right to have the lands according to the form of the lease. *Saffyn's case*, 5 Co. 124 b.

It followeth in this case, if the lessor in such case do reserve unto him a rent yearly, wherein two things are to be observed; first, Littleton doth not precisely affirm that a rent must of necessity be reserved upon such a demise; for 5 Co. 55, it is said, that the reservation of the rent is not of the substance of the lease; for a lease may consist without any reservation, either for part or for all, contrary to the vulgar opinion, who suppose of necessity that some rent be reserved, as a pepper-corn, a glove of gillflowers, or such other small thing. And therefore in the book last-mentioned it is

resolved, if a lease be made of the manors of Sale, Dale, and Down, *habendum* for twenty-one years, reserving out of the manor of Sale yearly 10*l.*, in this case the manor of Sale is only charged with the said rent, and this rent is incident unto the reversion of the manor of Sale only, and if in this case the lessor grant over the reversion of those other manors of Dale and Down, yet all the rent of 10*l.* doth remain with the lessor, nor his grantee may not distrain for the rent in the manors of Dale and Down; and in this case the lessor might have reserved rent for one time or for one quarter only, or he might have reserved 10*l.* out of the manor of Sale, for five years, and 10*l.* out of the manor of Dale for ten years after, or in other form at his pleasure; and he need not reserve a certain yearly rent, unless he be restrained to the contrary, as in the *Lord Mountjoy's case*, 5 Co. 5 b, he was restrained by act of parliament, *reddendum verum et antiquum redditum*, which old rent was payable at two feast days; and therefore in that case a lease made by him, reserving the same rent payable at one feast day only, was not good; but the words of the statute 13 Eliz. cap. 10, concerning leases to be made concerning spiritual persons are, "whereupon the old or accustomed yearly rent, or more, shall be reserved" indefinitely, and therefore although the accustomed rent was reserved to be paid at two or four feasts, yet if the rent reserved by them be payable at one feast day, it is good, and warranted by the statute, by reason of the word "yearly," and so the diversity between this case and the case of the Lord Mountjoy, for there is not this word *yearly*, the which doth explain the intention of the statute. 6 Co. 37 b.

But if a rent be reserved upon a lease for years, the law doth give the lessor, to him in the reversion, two remedies, as it appeareth (scil.) action of debt against the lessee, or he may distrain for the rent in the tenements; concerning the first, an action of debt is, because of the contract between the lessor and the lessee for years; for if a rent be reserved upon a lease for life, his remedy is by assise, if he have seisin, or by distress. 3 Co. 65 a.

And this action of debt lieth against the lessee after he hath assigned over all his interest unto any other (scil.) for the rent in arrear after the assignment; for the privity of the contract between the lessee and the lessor as unto the action of debt, doth remain, and if the lessor do enter for a condition broken, or if the lessee for years do surrender to his lessor, he shall have an action of debt for the arrearages due before the condition broken, or the surrender made; 3 Co. 23, *Walker's case*; where also it is said; if lessee for years do assign over his term, the lessor may charge his lessee or

his assignee, at his election, and therefore if the lessor do accept his rent of the assignee, he hath determined his election, and shall not have action against his lessee afterwards, for the rent due after the assignment. But then the lessor must have notice of this assignment. *Ibid. et vide Penant's case, 65 a, in 3 Co.*

The second matter in this place to be observed is, that every contract sufficient to make a lease for years, ought to have certainty in three limitations (scil.) in the commencement of the term, in the continuance of it, and in the end of it (1); and all this must be known at the beginning of the lease; and words touching leases, that have not these, are but babble, as Anthony Browne, Justice, said, in *Plowd.* 272. And these three in effect are but one matter, shewing the certainty of the time, by which the lessee shall have it, and if any of them fail, it can be no good lease, for then certainty doth fail. And the principal case there in *Plowden* was thus; a lease for ten years by indenture was made, the lessee doth grant to pay at the end of every ten years next, one hundred of tiles, and the lessor doth grant, that if the lessee, his heirs or assigns, do pay one hundred tiles to the lessor and his assigns, at the end of every ten years, that then the lessee shall have a perpetual demise, farm, and grant of the premises *de decem annis in decem annos continuè ut sequentur extra memoriam hominis*; this [is] not a good lease beyond the first ten years; because here is no certain time expressed how long the time shall continue; for it is appointed upon the payment, that the lessee shall have a perpetual demise from ten years in ten years continually ensuing out of the memory of man. So it is not only a demise from ten years in ten years, which is as much as twenty years, which words would make a good lease for twenty years, if he had there stopt; but he hath complied therewith other terms which maketh all uncertain, that is to say, that the demise shall be perpetual, shall be from ten years in ten years continually, and out of the memory of man, which words "perpetual," "continually," and "out of memory of man," do not contain any certain term, but time without time. But such a term of years which hath certainty in it, may well be said "a term," and always containing such time, shall be good, as a lease for ten years and so from ten years to ten years during one hundred years, shall be a good lease for one hundred years, and such a limitation is good as an express lease for one hundred years: and so *Weston*, Justice, said, that a

(1) See Co. Lit. 45 b.—Ed.



lease during the nonage of J. S. who is then of the age of fifteen years, is a good lease for six years, if J. at S. so long live; note in this case, if J. S. dieth before, this lease is determined *quod fuit concessum*; 3 Co. fo. 19 b; for the reference unto a certain time is as much as the express nomination of the time contained in the reference; so he saith, if I do make a lease till J. S. who is in prison for hunting, shall be in prison, because by the order of the law this is as much as if I had made the lease for two years, for so long by the statute Westm. 1. cap. 20, he shall be imprisoned; so he saith, if I make a lease for years, reserving 5*l.* yearly, and after I do grant the rent and reversion to another till he have received of the rents 20*l.*, this is all one as if I had granted the reversion for four years, and so the reference doth contain sufficient certainty of time; see 6 Co. 35 b: for if a lease have certain appointment of number of years, although the commencement or the end of it is appointed certainly upon an uncertain time, yet such a lease shall be good; as a lease for years, after the lessee do perform such an act, is good; and so a lease for twenty-one years if the coverture between J. S. and his wife do so long continue, is good; and yet it was uncertain in the one case when the lessee would perform such an act to make the lease to begin, and in the other case it was uncertain when the coverture shall be dissolved: but leases certainly limited may commence or determine upon such uncertainty, well enough: and so Weston said, if I shall make a lease for so many years as J. S. shall name, and after J. at S. in my life doth name certain years, the lease shall be good for the years which he doth name, for it is my demise and my contentation that he shall name the number of the years, which by my reference unto his nomination is as good as if I had named them. But if a lease be made for so many years as my executors shall name, and I do die, and my executors do name the years, there he saith that the lease was not good, because they did not name them during my life, and so in my life it was no lease, and therefore cannot be a lease after my death. 1 Co. 155 b.

But if a lease be made till J. at S. who hath an execution of a statute, be satisfied of a debt, for which he hath sued execution, there he saith that this is no good lease, and he shall not be said a termor for years, for it is not certain how long the lease shall continue, either for six years, for ten years, or twelve years, and so there was uncertainty at the time of the making of the lease, and therefore it cannot be said term of years, for *terminus* doth contain certainty. And so Browne doth say, if one doth make a lease for

three years, and so from three years to three years, during the life of J. at S.; that this shall be but a lease for six years, it hath a certainty, [for] for the first three years it was certain; and when he saith, and so from three years, this is as much as if he said, from those three years during other three, the which doth contain certainty; but when he doth go further, and saith, during the life of J. at S., this doth not contain certainty, for it is not certain how many three years J. at S. shall live; so that at the commencement the end was not known of the number of years intended, which is contrary to the nature of a lease for years, and therefore it shall be good but for six years in all, *quod Dyer concessit*: and Anthony Browne, Justice, saith, it hath been adjudged so: and Dyer said, that in his remembrance a parson did make a lease of his parsonage for five years [and so from five years] to five years during his life, as it is their common use to make leases, that this hath been adjudged a lease for ten years in all, and no longer, although the parson hath continued parson longer; and the cause was, because there was not certainty of years beyond the ten years. *Plowd. ibid. Vide Dyer, 24 a, et Plowd. 523 b, in fine.*

A lease is made to J. at S. for sixty years, reserving a rent *et provisum fuit per idem scriptum quod si prædictus J. at S. infra prædictum terminum sexaginta annorum obierit, quod statim et immediate post decessum ejus*, it shall be lawful for the lessor to re-enter, after which the lessor did demise the said lands to J. at Noakes for sixty years, *habendum et occupandum prædictum manerium eidem John at Noakes, executoribus et assignatis suis, cum post, sive per mortem, sursum reditionem vel forisfacturam prædicti Johannis at Style acciderit* [vacare], after which John at Style died, but no re-entry made by the lessor; the question was, when the second lease shall begin; for it must commence at that time which the lessor for himself doth limit, and at no other time; and it was objected, that if the second lease shall commence at all, it must commence at the death of John at Style; for this accident did happen, but the other two did not happen; and by his death, as this is the second lease, cannot begin in possession; for the said proviso in the first lease doth not make that lease void upon the death of the lessee, but doth give a re-entry to the lessor, &c.; so that till re-entry, notwithstanding the death of the lessee, the lease shall stand, and therefore for so much as the second lease is to commence after the avoidance of the first lease, by the death of the

lessee, for that cause it shall either never commence, or at least the term of the second shall commence from the time of the death of the lessee: as unto the first it was answered and resolved; that true it is that every lease for years ought to have certain commencement, but this is to be intended when it is to take effect [in] interest or possession, then the commencement must be certain; for a lease for years may be made upon condition contingent precedent, as if I do grant unto you, that if you do pay unto me 20*l.* at Michaelmas next coming, that you shall have my manor of Dale for twenty-one years; now it was uncertain whether this lease shall begin or not, and in the mean time till the payment of the money, this is not any lease, but sufficeth that the commencement be certain, when it is effected in interest or possession, then the commencement must be certain, so true it is that the continuance of the lease must be certain. But this is to be intended either when the term is made certain by express enumeration of the years, or by a reference unto a certainty by matter *ex post facto*, or by construction of law by express limitation. As [first], if a lease be made for twenty-one years, or any other certain term, &c. this is good, by the certain enumeration at the first. 2dly. By reference unto certainty, as if one do let the manor of Dale unto J. S. for so many years as J. S. hath in the manor of S., and he hath a term for ten years, the like term shall J. at S. have; so if a lease be made during the minority of J. at S., and he is of the age of ten years, this is a good lease for eleven years, if J. at S. so long do live; but if the wife of J. at S. be great with child of a son, and a lease is made till the issue in her belly do come to full age, this is no lease for years, for that the time when the lease is to take effect is uncertain; for it is uncertain when the son shall be born, and by consequence the continuance and the end of it is uncertain. 3dly. And when a lease for years shall be made good by reference, the reference must be unto a thing which hath express certainty at the time of the lease made, and not unto a possible or casual certainty, and therefore if I have a rent of 20*s.* *per annum* in fee issuing out of Blackacre, payable yearly at the feast of Pasche, and I do grant the same rent unto you till you have received of the same rent 21*l.* in this case you shall have this rent for twenty-one years; for this has reference unto an express certainty, (*scil.*) unto the yearly rent which is 20*s.* *per annum* in certainty: but if a man do make a lease of land to the value of 20*s.* *per annum* till 21*l.* be levied of the issues and profits, this is but a lease at will without livery; for it is not certain that the land shall be [each]

year of one yearly value. 4thly. When a lease shall be made good by matter *ex post facto*: it was resolved, if a man do make a lease from the feast of St. Michael, for so many years as J. at S. shall name, in this case if J. at S. do name a certain term in the life of the lessor, it is a good lease by matter *ex post facto*; and so it is of all leases which be to commence upon condition precedent.—6 Co. 35.

Indentures of demise were ingrossed, bearing date 26th May, anno 25 Eliz. of lands, to have and to hold for three years from thenceforth, and the indentures were delivered at four of the clock in the afternoon of 20th June the same year following, and when this lease by computation shall have commencement, viz. either from the day of the date, or from the delivery, was the question: and the court did resolve; 1st, that "from henceforth" shall be accounted from the day of the delivery of the indentures, and not by any computation from the date; for "from henceforth" is as much as to say from the making or from the time of the delivery of the indentures, or a *confectione præsentium*, for the confection or making of the lease doth commence by the delivery, *quia traditio loqui facit cartam*, 14 Eliz. Vide Dyer, 307, et 286 a; 2dly, whereas the indenture was delivered at four of the clock in the afternoon of the 20th day of June, that this lease shall end the 19th day of June, in the third year, for the law in the computation doth reject all fractions, or divisions of days, for the uncertainty which ever is the mother of contentions; 3dly, that in this case the day of the delivery of the deed shall be taken inclusive, and the day itself is parcel of the demise, so always where the demise is limited to commence a *confectione*. But if the lease be to commence a *die confectionis*, or a *die datus*, there the day itself of the date is excluded. 5 Co. li. 2. 1. and fo. 94. et Plowd. 171 b, in fine. "A" vel "ab" est dictio significativa primi termini, a quo, sicut dictio "usque" termini ad quem, et "a" vel "ab" accipitur [exclusivè] Co. ibid. Note, if a man be bound to you, or do contract with you to make to you a lease for twenty-one years indefinitely, the lease must be made to begin presently, and not *in futuro*. 6 Co. 33 a.

A man maketh a lease of Sexten's meadow to A. and of Cheese meadow to B. for twenty years, and after, by indenture, reciting both the said indentures or leases, did make a lease to Windham, Justice, of both, for forty years, to commence after the end and determination of the said several demises made to A. and B. and after

the lease of Sexten's meadow doth determine; and the lease of Cheese meadow doth continue; and the question was, when the two leases made to Windham shall commence, and it was adjudged, that the *habendum* in Windham's lease shall be taken respectfully.—*5 Co. fo. 7 b.*

A man seised in fee simple, maketh a lease for twenty-one years, to commence presently, and after the same day he maketh a new lease poll to another for the same term, or for a lesser term; this second lease is void to all intents and purposes, insomuch as if the first lessee do surrender his term unto the lessor, or do lose his term by reason of a condition broken, or do forfeit it by making feoffment and by entry of the lessor; yet the second lessee shall never have his term; *causa patet. Plowd. 432 a, in Smith and Stapleton's case.* But if a man seised in fee do make a lease for twenty-one years, and after the lessor do thereof make a lease to another man for greater number of years, as for thirty-one years, by poll, to commence presently, this second lease is good for the last ten years only, and for part of the first twenty-one years it is void, although the first lease do end within the time by forfeiture, surrender, or otherwise. *Ibid. b. et in Brucebridge's case, in Plowd. 421 b.*

So if a man seised in fee do make a lease for twenty-one years, to commence ten years after, and after the same day he doth make a lease by poll to another for thirty-one years, to commence presently, in this case the second lease is good only for the first ten years, and void for the last twenty-one years, as well against the lessor as against the lessee; so that the lessor shall not have any rent for the last twenty-one years, neither shall the second lessee have the land after the first ten years ended, although the first lessee before the commencement of his term, did re-grant his term unto the first lessor. *Ibid. 433 a.*

But if a man seised in fee simple, do make a lease for life, and do also make a lease to another for forty years, by poll, to commence presently, and after, viz. within a year after, the lessee for life dieth; in this case the lessee for forty years may enter, and ought to have the land for so many of the forty years as then are to come; for there the first estate for life had not a certainty of continuance; and see the diversity. *Ibid.*

And there it is said by some, that the lessor had not the power to contract for the possession during the life of tenant for life, and therefore if the lessee for life surrender, yet the lessee for forty years shall not have the land during his life.

But in *Bracebridge's case*, 422 a, it is said in this case, that if the first tenant for life die, or surrender, the second lease shall commence presently in the one case, and in the other; for possibility was at the time of the contract that the lease shall commence to be executed before the death of the tenant for life, that is to say, by his surrender or forfeiture, or by such like. *Ibid. Quære legem.*

A man seised in fee simple doth make a lease to Parratt and his wife for forty years, if they so long live, and after during their lives the lessor demiseth the same land to George Griffith, for seventy years, to begin presently by poll; the second lease is good, and may commence after the death of Parratt and his wife, or after forfeiture or surrender. But if a man make a lease the 1st day of May, for twenty-one years ensuing the 1st of June, which is defeasible upon condition to be performed on the part of the lessor, and the 2d day of May he makes another lease without deed for twenty-one years from the 1st day of June next ensuing, if the condition be performed and thereby the first lease is avoided, or if the first lessee surrender, yet the second lessee shall never have the land by force of the second lease; because the lessor had no power to contract with the second lessee at the time of the second lease made; because during the second lease, another had the land in possession, and the contract cannot be good in respect of a condition or of a surrender, and so *nota* diversity. *Plowd.* 422 b. And so is the law taken for a present contract of land *par parole*, or by words only.

But if the second lease be made by deed indented, or by fine, then if the first lease be surrendered or forfeited, the second lessee may enter, and hold it against the lessor; for as well the lessor as the lessee are concluded to say the contrary, but that the lessor had the land in possession to pass, and that it did pass in possession, according to the tenor of the lease; or if the lessor had nothing in the land, but did purchase the land after the lease, or if the land did descend unto him after the lease, that the lessee may enter upon him, because of the conclusion and estoppel, and in like manner by estoppel the lessee shall be compelled to pay the rent. *Ibid.* 434 a, in the case between *Smith and Stapleton*.

And it is taught in Littleton, *Discontinuance*, 143 [s. 644], that the incumbent or parson hath not in him the mere right of things, which he hath in right of his church; and every thing which he doth may be avoided, when he doth cease to be incumbent, but only such which he made with the assent of the patron and ordinary;

and therefore the confirmation of the patron and ordinary are necessary in that case, whose confirmation, or the confirmation of a disseisee, or of any other that is in reversion, may, by apt words, abridge any part of those number of years which are expressed in the original lease. In 5 Co. 81, a prebendary did make a lease for seventy years, the bishop, patron of the said prebend, and the dean and chapter, by their several instruments under common seal, did confirm the land only for fifty-one years.

By the stat. 13 Eliz. cap. 10 (1), it is enacted, and for that long and unreasonable leases made by colleges, dean and chapters, parsons, vicars, and others, having spiritual promotion, be the chiefest causes of the dilapidations and decay of all spiritual livings and hospitality, and the utter impoverishing of all successors, incumbents in the same; be it enacted by the authority aforesaid, that from henceforth all leases, gifts, grants, conveyances, feoffments, or estates to be made, had, done, or suffered by any master or fellow of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other having any spiritual or ecclesiastical living, of any houses, lands, tithes, tenements, or other hereditaments, being any parcel of the possessions of any such college, cathedral, church, chapter, hospital, parsonage, vicarage, or other spiritual promotion, or anywise appertaining or belonging to the same, or any of them, to any person, bodies politic, or corporate, other than for the term of twenty-one years, or three lives, from the time as any such lease or grant shall be made or granted, whereupon the accustomed yearly rent or more shall be reserved and payable yearly, during the said term, shall be utterly void and of none effect, to all intents, constructions, and purposes; any law, custom, or usage, to the contrary notwithstanding.

It hath been holden that whereas an archdeacon did make a lease for three lives, according to this act; and the lessees made a lease for one hundred years, and the archdeacon, the bishop, and the dean and chapter did confirm it, yet this shall not bind the successor; for if such a confirmation should not be said a conveyance within this act, the statute should serve for little or nothing, and the good intention and the purview of the act should be defeated and defrauded. But it was holden in Trinity, 30 Eliz. in a case depending by English bill in the Chequer Chamber, between Hodges, plaintiff, and Newcombe, defendant, by Sir Roger Manwood, Chief Baron, in, and

(1) See Co. Lit. 44 a, *et seq.*—Ed.

all the other Barons in the Exchequer, that where the parson of Weston, in the county of Gloucester, *anno* 9 Eliz. did demise his rectory unto William Hodges, then patron of the same rectory, for fifty years, who in the 14th year of the said queen, by his deed did assign it over unto Sir John Throckmorton, the bishop did confirm this lease in the 17 Eliz. in the life of the lessor, that the said confirmations were good. 5 Co. 15 a. But notwithstanding that good statute made 13 Eliz. divers persons by suit did obtain divers long and unreasonable leases, by colleges, deans, and chapters, and by others, in the statute mentioned to be made unto the queen, and from her again they received assignments, but all those undue conveyances are void in law, as is resolved in 5 Co. 14 a, and in 11 Co. 67, *et fo.* 75 b.

Note, by the statute made 14 Eliz. cap. 11, it is enacted, that the said statute made 13 Eliz. shall not extend to any grant, assurance, or lease, of any houses belonging to the persons, bodies politic, or corporate aforesaid, nor to any grounds to such houses appertaining, which houses be situate in any city, borough, town corporate, or market town, or the suburbs of any of them, but that all such houses and grounds may be granted, demised, and assured, as by the laws of this realm, and the several statutes of the said colleges, cathedral churches, and hospitals, they lawfully might have been before the making of the said statute, or lawfully might be, if the said statute were not; so that such house be not the capital messuage, or dwelling house, used for the habitation of the persons abovesaid, nor have ground to the same belonging, above the quantity of ten acres; any thing in the said act to the contrary notwithstanding. And by the 18 Eliz. cap. 11. all leases are void made by them, whereof there is any former lease in being, not to be expired or surrendered within three years.

By the statute of 1 Eliz. not printed, which nevertheless is to be read in the Abridgment of Statutes, *titulo Leases*, 4. whereby archbishops and bishops are prohibited to make leases for longer time than for twenty-one years, except to the queen, which exception is now taken away. 1 Reg. Jacobi, cap. 3.

In 32 H. 8. cap. 28. a statute was made, intituled, An act that lessees shall enjoy their farms against tenants in tail, or in the right of their wives or churches. Provided always, that this act, nor any thing therein contained, shall not extend to any leases to be made of any manors, lands, tenements, or hereditaments, being in the hands of any farmer or farmers by virtue of any old lease, unless



the same old lease be expired, surrendered, or ended, within one year next after the making of such new leases; nor shall extend to any such grant to be made of any reversion of any manors, lands, tenements, or hereditaments; nor to any lease of any manors, lands, tenements, or hereditaments, which have not most commonly been letten to farm, or occupied by the farmer there, for the space of twenty years next before such lease thereof made; nor to any lease to be made without impeachment of waste; nor to any lease to be made above the number of twenty-one years, or three lives at the most, from the day of the making thereof; and that upon every such lease there be reserved yearly during the same lease, due and payable to the lessors, their heirs and successors, to whom the same lands should have come after the deaths of the lessors, if no such lease had been thereof made, and to whom the reversion thereof shall appertain, according to their estates and interest, so much yearly farm rent, or more, as hath been most accustomedly yielden, or paid, for the manors, lands, tenements, and hereditaments, so to be letten, within twenty years next before such lease thereof made; and that every such person or persons, to whom the reversion of such manors, lands, tenements, or hereditaments, so to be letten, shall appertain as is aforesaid, after the death of such lessors or their heirs, shall and may have such like remedy and advantage, to all intents and purposes against the lessors thereof, their executors, and assigns, as the same lessor should or might have against the same lessees. So that if the lessor were seised of any especial estate in tail of the same hereditaments, at the time of such leases, that the issue or heir of that special estate, shall have the reversion, rents, and services, reserved upon such lease, after the death of the said lessor, as the lessor himself might or ought to have had, if he had lived.

If a lease be made for life, and after the lessor doth make a lease for fifty years, to begin presently, although the lessee cannot enter, yet the lease for years shall commence according to the limitation of the lessor, and so many years shall run out before his entry, as did incur in the time of the first lease for life. But lessee for years to begin presently, or *in futuro*, cannot have any action of trespass against any, concerning the land before his entry. If a lease for ten years be made, to begin at the feast of St. Michael the Archangel next after the lease; and before the same feast, the lessee do surrender unto the lessor, this is no good surrender. But if a man seised of land, do let it for ten years, to commence immediately, and

the lessor do waive the possession, before any entry made into the said land by any person, the lessee do surrender his estate unto the lessor, this is a good surrender. *Perk. 115 a. b.* If a man do make a lease for years, to commence at a future day, and before the day the lessor is disseised, yet the lessee may grant over his interest; for such *interesse termini* may not by disseisin or feoffment be divested and put unto a right, no more than a rent or common, or *similia*. Also, if a man make a lease for years, to begin after the end or determination of a former lease *in esse*, the first lease doth determine, but the second lessee doth not enter, but he in the reversion doth enter and maketh a feoffment, and levieth a fine of the land with proclamations, according to the stat. 4 H. 7. cap. 21, and five years after proclamation do pass without entry or claim made by the second lessee, the lessee for years is barred, although he did not enter according to his lease; for he might have entered presently after the lease determined, so that his interest was accomplished with present entry and ability to take the profits, which he may transfer unto another; so it may be divested out of him, and put to a mere right, not grantable. But otherwise it is if the first lease for years had been in being undetermined at the time of the feoffment, and fine levied by him in the reversion; for in that case, all the time of the fine levied, the second lessee had no power to enter, or to take the profits, but only a future interest, which, if it may be divested, he had no possible means to revest it, which case hath been adjudged *Mich. 21 Eliz. Nota Saffin's case, in 5 Co. 124.*

The words of Littleton also, in this place, are, if the lessor in such case do reserve unto him a yearly rent upon such a lease, he may choose to distrain for the rent in the tenements he used; or he may have an action of debt for the arrearages against the lessee; wherein divers things are observable; first, that the reservation of rent is not necessary, or of the substance of the lease; for a lease may consist without any reservation of rent; for if a man make a lease to A. B. of the manors of Dale, Sale, and Down, to have and to hold to him the said manors for twenty-one years, reserving yearly out of the manor of Dale 10*l.*, in this case the manor of Dale is only charged with the rent, and the manors of Sale and Down be not chargeable with it; and in this case this rent is incident unto the manor of Dale only; for if the lessor do grant over the reversion of the manors of Sale and Down, yet all the rent of the 10*l.* doth remain with the lessor, and the lessor or the lessee cannot distrain for this rent in the manors of Sale and Down; and

in the same case the lessor might have reserved a rent of 10*l.* out of the manor of Dale during five years, and 10*l.* out of the manor of Sale during ten years, and 10*l.* out of the manor of Down, to commence ten years after, and the one upon condition precedent, and the other upon condition subsequent, and the third absolute; to be paid at several days and places; in which cases, without question the rents be several, [for] for the rent of the one the lessor cannot distrain in any of the others, and surrender of one manor doth not extinct the rent for the others.

But in special cases the lessor may be so restrained, that he must reserve the ancient and accustomed yearly rent, otherwise his lease shall be void; as if a lease be made by virtue of the statute of 32 H. 8. cap. 28, the title whereof is, An act that lessees shall enjoy their farms against tenant in tail, or in the right of wives or churches, *see Bellamy's case*, in 6 Co. 37; and so if a lease be made by virtue of the statute 13 Eliz. cap. 10; and *see the Lord Mountjoy's case*, in 5 Co. fo. 5; wherein the lessor was restrained by act of parliament, that he should do nothing *ad nocumentum hæredum eorum*, and that upon all leases to be made *verus et antiquus redditus* shall be reserved, without saying *ad usuales festos*, and yet for so much as it was usual to reserve the rent to be paid at four several feast days, and in that case the lessor did reserve the rent payable at two feast days, it was adjudged a void lease.

The second observation here is, that the law doth give two remedies to recover his rent, so reserved, viz. either by distress upon the land demised, or by action of debt. But for a rent reserved upon a lease for life, his remedy is by assize, if he have seisin, or by distress, for in that case he could not have an action of debt because of the contract. 3 Co. 65*a.*

But if the lessor will use the benefit, which by the law is given to him for his rent reserved, reason and law require that the lessee do enjoy the land in such sort demised unto him, which he cannot do unless the lessor was seised thereof, and true owner; for *nemo potest plus juris ad alium transferre quam ipse habet*. 4 Co. 24. As, for example, the disseisee maketh a lease for years reserving a rent, or the heir apparent in the life-time of his father; or if a man make a lease of certain lands, and after purchaseth the said lands, yet the lease and the rent are void. *Plowd.* 432*b.* But he that hath a possession in law may make a lease, and reserve a rent thereupon; but after the death of my father a stranger doth abate, a lease made by me afterwards is void. *Plowd.* 137*b.* 142*b.* 421*b.* 434*a.* for the rent

reserved is to be raised of the profits of the land, and is not due till the profits be taken by the lessee; for these words *reddendo inde*, or *reservando inde*, are as much as to say, that the lessee so much of the profits and issues at such day [do render] unto the lessor, for *reddendo nihil aliud est quam acceptum restituere seu reddere, et quasi retro dare, et redditus dicitur a redeundo, quia retroit (scilicet.)* unto the lessor, donor, &c. *sicut proventus a proveniendo et obventus ab obveniundo*, and this is the reason, that the rent so reserved is not due or payable before the day of payment incur, because it is to be rendered and restored of the issues and profits; *vide sect. 513. 10 Co. 128*; for the duty doth accrue upon the perception of the profits of the land, and till the feasts do incur, in which it is to be paid, it is not *debitum* nor *solvendum*. *8 Co. 153 a.*

The last thing to be observed in this section is, that if a man do make a lease for years by word or by deed poll, reserving a rent, in such cases the lessee may plead, that the lessor had nothing in the land, at the time of the lease made, if so the truth of the case be. But if the lease be by deed indented the law is otherwise. *16 H. 7. 3 b.* For although he in the reversion after a lease for twenty-one years do by poll grant unto another a lease of the same lands for the number of years before demised, this second lease is void to all purpose, as well in respect of the lessee, as of the lessor, touching his rent reserved; or if the second lease be made by deed poll without attornment, it is in the same case. Yet when such a second lease is made by indenture or by fine, which are matters of estoppel, in such case as well the lessor, as the second lessee, are concluded to say that the lessor was not seised of the land at the time of the lease made; and therefore the second lease beginning presently by the estoppel, the first lease had continuance, of which matter read at large in *Plowd. 432, et seq. and ibid. fo. 433 a.* where this case of Littleton is cited. But the law hath two ways to make contracts, or agreements, both for lands and for chattels; the one by words, which are more base; the other by writing, which is more high; words are spoken many times without advisement, or consideration, but where the agreement is made by deed in writing, there is no stay; for when a man doth pass any thing by deed, first he hath a determination of mind to do it, and thereupon causeth it to be written, and this is one part of deliberation; and after he doth put unto it his seal, and this is another part of deliberation; and thirdly, he delivereth the writing as his deed, and this is a consummation of his resolution; and by the delivery of the deed from him who made

it unto him to whom it is made, he doth give his consent, that he doth depart voluntarily from the thing contained in the deed, unto him to whom the delivery is made, and this delivery is as a ceremony in law, signifying plainly his good will, that the thing in the deed shall pass from him to the other; so that there is indeed a great foresight and deliberation in the making of them, and therefore they are received in law as a bond final unto the party, and doth adjudge them to bind the party, without thinking what cause or consideration there was for the making thereof: *Plowd.* 308 *b.* *et seq.*: and much more when such agreement is made by indenture, &c. the one and the other are concluded to say any thing contrary to that, which therein is contained; for the words of an indenture are the words of every party; and although they are spoken but as the words of one party, yet they are the words and agreement of all parties. *Plowd.* 134 *a.* 421 *a.* *Vide Finch's 2d book, 32.* what is an indenture sufficient and what not, *see 5 Co. 20 b.* and how they are made, read in *Litt. sect. 371.*

But *nota*, when a lease is made by deed indented, which doth go by way of passing an interest, such deed indented shall not be taken for any conclusion. *6 Co. 15 a.*

§ 59. And it is to be understood, that in a lease for years, by deed or without deed, there needs no livery of seisin to be made to the lessee, but he may enter when he will, by force of the same lease. But of feoffments made in the country, or gifts in tail, or lease for term of life; in such cases, where a freehold shall pass, if it be by deed or without deed, it behoveth to have livery of seisin.

In this case a difference is taken between a lease for years, which is a chattel real, and a lease for life, or other estate of freehold, to be conveyed; for although in this they agree, that as well the one as the other may be conveyed by poll, without writing, as by deed in writing; yet in this they differ, (*scilicet*.) to the perfecting of a feoffment, whereby any estate of freehold shall pass, the law doth require this solemnity and ceremony of livery and seisin; but if I by deed do grant to one and his heirs all my trees, which be in my manor of D, the grantee hath the inheritance in them without any

livery and seisin. 11 Co. 49 b. *Nota*, which for the sufficient making of a lease for years is not required. And as these divers estates and interest do apparently shew great difference, so many other distinct diversities there are between them, which I omit particularly to express, but refer the reader to these books, 5 Co. 94 b. *Plowd.* 155. 197 b. 135 b. *in fine*. The reason of the law in this case of livery and seisin is thus declared in *Plowd. fo.* 25 a. it is to be considered, noted, and known, that in every commonwealth, it is requisite and necessary that things may be certainly conveyed; for certainty doth engender repose, and uncertainty contention; the occasion of which contention, our law foreseeing, hath prevented, and therefore hath ordained certain ceremonies to be used in the alienation and transmutation of things from one man to another; and namely, of freeholds, which be of greater price and estimation in our law than other things, thereby to know the time certain when those things shall pass; and therefore in every feoffment the law hath ordained that livery and seisin shall be made, and in every grant of reversion, rents, &c. that attornment shall be made; and in 5 Co. 84 b. it is said, that the reason of the common law that lands shall pass by solemn livery, was to give notice to the country who be owners of the said lands, to the intent that none shall be defeated in the taking of leases; and every one may have notice, who shall be tenants unto the *præcipe*; and lords may have better notice of their tenants to have wardships, escheats, &c.

Livery and seisin was a ceremony, as it seemeth, in Normandy, for when William the Norman first landing at Hastings in Sussex, fell down stumbling as he came out of his ship, "*tenes Angliam comes*," said one of his knights, "*rex futurus*;" and espying that he had brought up sand and earth in his hand, added, "yea, and you have taken livery and seisin of the country." *Selden*, 34. *Vide tamen, Lambert's Perambulation*, 403.

This manner of purchasing lands is public and notorious, and in ancient time it was the common and usual assurance of the land. 5 Co. 85. And the manner and form, how livery and seisin shall be well and effectually done, is declared in 9 Co. 137 b. in these words: although most properly livery and seisin is made by the delivery of a twig, or turf of the land itself, whereof livery and seisin is to be made; and so it is well to be observed; yet delivery of a turf or twig growing upon other land, or of a piece of gold or silver or other thing upon the land, in the name of seisin, is sufficient; for the turf or twig which doth grow upon the land, when

it is severed, is not parcel of the land; and when the feoffor is upon the land, his words without other act are sufficient to make livery and seisin, as if he doth say, "I deliver seisin to you in the name of all the land contained in this deed; or, enter you into this land and take seisin of it in the name of all the land contained in this deed," or other such words, without any ceremony or act done. And this is the reason that the delivery of any thing upon the land in the name [of] seisin is sufficient, because the words only, without any thing were sufficient; for if words only out of the land, which is within the view, be sufficient, *à fortiori* when they are spoken upon the land itself. Nevertheless it is not safely done to omit the usual ceremonies and acts in such cases, for they do express better the remembrance of the things done, because they are subject to view, more than words which he heard only, and which easily use to slip out of memory; *certior aure est oculus*: and therefore it was resolved that the delivery of the deed of feoffment upon the land in the name of seisin, is sufficient in the law. But the sole delivery of the deed of feoffment upon the land without such explanatory words, doth not amount unto a livery, for it hath another effect (*scilicet*.) to take effect as a deed. *Et vide sect. 66. et 6 Co. 26.*

*Nota*, if the deed of feoffment do contain both a feoffment of the mansion-house, and also of lands, if livery and seisin be made either in the house or in any part of the lands, according to the effect of the deed, it is good and effectual for all; and so the possession by keeping the keys of the dwelling house, or of any parcel of the lands to him demised, is an impediment to the livery for all, which to the lessee is demised. *2 Co. 31 b.*

§ 60. But if a man letteth lands or tenements by deed, or without deed, for term of years, the remainder over to another for life, or in tail, or in fee; in this case it behoveth, that the lessor maketh livery of seisin to the lessee for years, otherwise nothing passeth to them in the remainder, although that the lessee enter into the tenements. And if the termor in this case entereth before any livery of seisin made to him, then is the freehold, and also the reversion, in the lessor. But if he maketh livery of seisin to the lessee, then is the freehold, together with the fee to them in the remainder, according to the form of the grant and the will of the lessor.

Although to the perfecting of a lease for years livery of seisin is not requisite; yet if the lessor do appoint a remainder of an estate of freehold to depend upon the same lease, then livery of seisin is necessary for the supporting of the said remainder; and in that case the livery must be made *eo instanti*, when the lessee doth enter by virtue of his lease; for if the lessee do enter before the livery, the lease is good, but the remainder is void. As if I appoint the lease to commence at Michaelmas next coming, the remainder over in fee, &c.; although the lessor do make livery and seisin to the lessee, yet the livery of seisin and the remainder shall be void, because there is no estate present, to which the livery may be annexed, nor to which it may cleave in the mean time. *Plowd. 156a.* And in *5 Co. 94b.* it was agreed, if a man do make a lease for years unto A. the remainder unto B. for life, in this case the lessor ought to make livery unto A. before his entry, and by his livery unto A., B. shall take a present estate for life by way of remainder, by force of the livery made unto the lessee for years.

But if a lease be made for years, or for life, [and] the lessor do grant the reversion of the land after the expiration, &c., of the lease for years, or after the death of the tenant for life; the grantee of the reversion, after the death of tenant for life, or after the expiration of the lease, may enter *propria autoritate*, without any ceremony of livery and seisin. *Sir John Davies R. fo. 82a.*

In this place is also shewed, that a remainder of a freehold may depend as well upon a lease poll for years, as it were by writing; and the same law is of a lease for life by poll, the remainder over, as may be collected, *sect. 215*, and therein doth agree *5 Co. 95a. in fine.* And *nota*, the great force of a livery and seisin, in *1 Co. 111b.*

§ 61. And if a man will make a feoffment, by deed or without deed, of lands or tenements which he hath in divers towns in one county, the livery of seisin made in one parcel of the tenements in one town, in the name of all the rest, is sufficient for all other the lands and tenements comprehended within the same feoffment in all other the towns in the same county. But if a man maketh a deed of feoffment of lands or tenements in divers counties, there it behoveth in every county to have a livery of seisin.



The young student may peradventure conceive, that this case doth disagree from the reason, before alleged, of the first institution of the solemnity of livery and seisin; for how can that be notorious throughout all a shire or county, which is done in one corner, or in other part thereof only. But it is to be remembered, which is once before cited, upon the 31st sect.; that the exterior semblance of discordance of cases ariseth only by the interior intelligence of the cases, and of the reason and the rule thereof; [for], for the most part every particular case is judged upon a particular cause, and the reason wherefore livery, made in parcel of the tenements of one town, shall be sufficient in all the other towns within the same county is, because every county is, in respect of the special and distinct government thereof as an entire body; and therefore also it is, that an exchange of lands in the same county is good by poll, but in divers counties must be by deed indented. Also, a man must take notice at his peril of divers things, done in the same county or shire where he is, but not of things in another shire; for, although an action of debt be brought against executors, it is lawful for them to pay the assets which they have unto another to whom the testator was indebted, till notice of the action, if the suit be in another county; for otherwise they must take notice of the action at their perils. *Finch. book 3, cap. 14, fo. 114b, vide librum.*

But by livery and seisin in one county, the lands in another county shall not pass; yet if the site of the manor of Dale be in the county of Essex, and parcel of the same manor do extend in the county of Middlesex, and a feoffment is made of the manor of Dale, and livery of seisin is made of the site of the manor which doth lie in the county of Essex; by this livery of seisin, the parcel of the manor which lieth in Middlesex doth pass; because it is parcel of the things, (*scilt.*) the manor of which the feoffment was made, the which manor is but one entire thing as unto this purpose.

But if the feoffment be made of the manor of Dale, which manor doth extend to Dale and Sale, and the livery of seisin is made accordingly in Dale, nothing doth pass by this feoffment, but only that which is in Dale; and the livery of seisin is made of Dale, and not elsewhere: *Perk. fo. 46: and vide the case 45 E. 3. fo. 21, cited in Dyer, 40a*; the diversity taken, where there is a distance between the counties, and where not; for the law doth intend they of the town may take notice of all manner of acts done in the same town, but if the counties were distinct the law doth intend the contrary.

§ 62. And in some cases a man shall have, by the grant of another, a fee simple, fee tail, or freehold without livery of seisin. As if there be two men, and each of them is seised of one quantity of land in one county, and the one granteth his land to the other in exchange for the land which the other hath, and in like manner the other granteth his land to the first grantor in exchange for the land which the first grantor hath; in this case each may enter into the other's land, so put in exchange, without any livery of seisin; and such exchange, made by parol, of tenements within the same county, without writing, is good enough.

This case of exchange is also a kind of assurance of land in our law, and in some cases and respects it is more safety for the purchaser, than any absolute purchase. *Vide in 4 Co. 123 a.* And it doth agree with the before recited case of feoffments, in this, that by way of exchange any estates of frank-tenements which lie in one same county, may pass without deed or writing; but the difference is, that an exchange of any estate of freehold or inheritance is good without any livery of seisin; and the cause and reason thereof is, because by the entry of each party to exchange, it is no less notorious to the country, than in cases where livery and seisin is made. *9 Co. 95 b.*

§ 63. And if the lands or tenements be in divers counties, viz. that which the one hath in one county, and that which the other hath in another county, there it behoveth to have a deed indented made between them of this exchange.

As in a feoffment of lands in several counties, it is necessary that livery and seisin be made in all those several counties, so in this case of exchange of lands in several counties, the law requireth that it be by deed indented; but partition may be made between parceners of lands in several counties, by word without writing. *11 H. 4. fo. 61. sect. 250.*

And by indenture a man may exchange lands in England, for lands in Ireland or Scotland, or for lands in any other place within the king's dominions. *7 Co. 19 b, in fine.*

§ 64. And note, that in exchanges it behoveth, that the estates which both parties have in the lands so exchanged, be equal: for if the one willeth and grant that the other shall have his land in fee tail for the land which he hath of the grant of the other in fee simple, although that the other agree to this, yet this exchange is void, because the estates be not equal.

§ 65. In the same manner it is, where it is granted and agreed between them, that the one shall have in the one land fee tail, and the other in the other land but for term of life; or if the one shall have in the one land fee tail general, and the other in the other land fee tail especial, &c. So always it behoveth that in exchange the estates of both parties be equal, viz. if the one hath a fee simple in the one land, that the other shall have like estate in the other land; and if the one hath fee tail in the one land, the other ought to have the like estate in the other land, &c. and so of other estates. But it is nothing to charge of the equal value of the lands; for albeit that the land of the one be of a far greater value than the land of the other, this is nothing to the purpose, so as the estates made by the exchange be equal. And so in an exchange there be two grants, for each party granteth his land to the other in exchange, &c. and in each of their grants mention shall be made of the exchange.

In exchange between tenant for life and tenant in tail after possibility of issue extinct it is good, for their estates are equal. 11 Co. fo. 80. Although the estate of tenant after possibility be of greater value in equality, because the estate is dispunishable for waste. *But see Perk. 55.* If tenant for his own life do exchange an estate for another's life, it is no good exchange for lands in possession. 4 Co. 122 b.

In exchanges the equality of estates are necessary; but it is to be observed, that though an exchange made by two tenants in tail of equal estates is good, [and doth] bind the parties during their lives, yet after the death of any of them the issue in tail may enter and avoid the exchange if he will. *Westm. 2. cap. 1. 14 H. 6. 2. 1 Co. 96 b.*

§ 66. Also, if a man letteth land to another for term of years, albeit the lessor dieth before the lessee entereth into the tenements, yet he may enter into the same tenements after the death of the lessor, because the lessee by force of the lease hath right presently to have the tenements according to the form of the lease. But if a man maketh a deed of feoffment to another, and a letter of attorney to one to deliver to him seisin by force of the same deed; yet if livery of seisin be not executed in the life of him which made the deed, this availeth nothing, for that the other had nought to have the tenements according to the purport of the said deed, before livery of seisin made; and if there be no livery of seisin, then after the decease of him who made the deed, the right of these tenements is forthwith in his heir, or in some other.

If a man let lands to another for term of years, although the lessor die before the lessee do enter, yet he may enter into the same lands after the death of the lessor; because the lessee by force of the lease hath right to have the tenements according to the form of the lease (1). But in case where a feoffment or other estate of frank-tenement is made, if livery of seisin be not made in the life of the feoffor, &c. it is not good, whereof before in this chapter is spoken. So in case of a grant of a reversion, if the grantor die before attornment, it is void, as you may read in 2 Co. *Sir Rowland Heyward's case* [35], and in *Litt. sect.* [568]; for when an interest or an estate, which is to be reduced to a certainty upon a contingent precedent, and the lessor or grantor, or lessee or grantee, die before the contingent do happen, the lease or grant is void, and shall never take effect. *Plowd.* 273 b. 1 Co. 155 b. And so in exchange, if it be not executed by entry in the life of both parties, the exchange is void; if two parties exchange land in fee simple, or fee tail, if both parties die, before the exchange be executed of any party, the exchange is void; for if the heirs should enter, they should be in as purchasers by force of the words, which were words of limitation of the estate, and not of purchase.

(1) See the reason of this case well rendered in 5 Co. 124 b, *Saffyn's case*.—*Note in MS.*

§ 67. Also, if tenements be let to a man for term of half a year, or for a quarter of a year, &c. in this case, if the lessee commit waste, the lessor shall have a writ of waste against him, and the writ shall say, *quod tenet ad terminum annorum*; but he shall have an especial declaration upon the truth of his matter, and the count shall not abate the writ, because he cannot have any other writ upon the matter.

It appeareth before, in the title of Tenant by the Curtesy, that his estate, and that other of dower, were estates by the law created, and therefore the same common law, considering that they had but particular estates in the land, and no inheritance, did prohibit that they should do any manner of waste to the disheritance of them in the reversion; for the law will *suum cuique tribuere, et expedit rei-publicæ ne quis re suâ male utatur*; but against lessee for years or life, the common law provided no remedy in the case; because they had their interest in the land by the only act of the lessor, and it was his folly to make such leases, and not to restrain them by covenant, condition, or otherwise, that they should not do waste. *Dr. & Stu. li. 2. ca. 1. 5 Co. 13 b. See sect. 56.*

Therefore remedy was provided by the statute of Marlebridge, cap. 23, made 53 H. 3, and after the statute, a prohibition did lie also against lessees, 11 Co. 81 *b*; and after, by that general statute of Gloucester, cap. 5, action of waste was given against all particular tenants, which statute was made *anno* 6 E. 1, and though the statute be not in this place mentioned, yet it is so to be understood, because at the common law lessee for years was punishable for waste: which statute, though it be the plural number against the tenants *pro termino annorum*, and is a penal law, yet it is taken by equity, and an action for waste will lie against him that holdeth but for one year, or for twenty weeks, or for less time. *Plowd. 178 a. 467 a*, and so in *Plowd. fo. 86 b*, more examples that the plural number doth contain the singular. It is also observable, that immediately after the making of this statute, for so much as commonly leases for years were made *pro termino annorum*, therefore they in the Chancery did frame their writs accordingly: and therefore in process of time, when such a special cause of action did happen against one who did hold but for a quarter of a year or such like, the party

was drawn to use the general form of the writ (1), for other writs they in the Chancery would not make, in regard whereof the party pursuing is excusable, though the matter in his declaration do discover special matter. 7 H. 7. 2. *Per curiam*. Keilw. 114. pl. 51. 6 H. 7. 7 b. But in all cases where the plaintiff may have especial writ according to his special case and doth not, there where it doth appear to the court, that there is variance between the writ and the declaration, the writ shall abate; and see to this purpose, in 5 Co. 31 a. Dyer, 84 a.

Note reader, the stat. Westm. 2. cap. 24, which was made anno 13 E. 1; it is provided, *et quotiescunque de cætero evenierit in Cancellariâ quod in uno casu reperitur breve, et in consimili casu cadente sub eodem jure, et simili indigente remedio, non reperitur, concordent clerici de Cancellariâ in brevi faciendo, vel atterminent querentes in proximum parliamentum, et scribantur casus in quibus concordare non possunt, et referant eos ad proximum parliamentum et de consensu juris-peritorum fiat breve, ne contingat de cætero quod curia domini regis deficiat conquerentibus in justitia perquirendâ.*

### LIB. I. CAP. VIII.—TENANT AT WILL.

§ 68. Tenant at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him. Yet if the lessee soweth the land, and the lessor, after it is sown, and before the corn is ripe, put him out, yet the lessee shall have the corn, and shall have free entry, egress, and regress, to cut and carry away the corn, because he knew not at what time the lessor would enter upon him. Otherwise it is if tenant for years, which knoweth the end of his term, doth sow the land, and his term endeth before the corn is ripe. In this case the lessor, or he in the rever-

(1) *Ad ea quæ sæpius accidunt brevibus adaptantur*; writs are framed according to that which falleth out most usually,

and a special case shall have a usual writ, but a special count. Vide 5 Co. 127 b, Palmer's case.—*Note in MS.*

sion, shall have the corn, because the lessee knew the certainty of his term and when it would end.

These be estates which we have in our law, fee simple, fee tail, for term of life, for term of years, and at will. *Bro. Justice*, 14 II. 8. 12 b. But *nota*; that to some things one estate *tantum* is incident by the law, whereof divers estates cannot be limited; as all offices ecclesiastical; *see in Plowd.* 497 a. And this estate at will is made in two manners, either expressed by the lessor by words or writing, or otherwise by construction of law according to the meaning of the parties; this is proved *sect.* 70, and in 273. 6 Co. 35 b, and by *Potkin's case*, in 14 II. 8. [10 b.] *ut res magis valeat quam pereat; nihil tam conveniens est naturali equitati, quam desiderium domini volentis in alium rem suam transferre ratum habere. Bract. li. 2. cap. 18.* And in 6 Co. book before mentioned, fo. 35 b, this case was amongst others resolved; if I have a rent of 20s. *per annum* in fee, issuing out of Blackacre, payable yearly at the feast of Easter, and I do grant the same rent to you till you have received of the same rent 21l., in this case you shall have this rent twenty-one years; for this is referred unto an express certainty, that is, unto the yearly rent of 20s. *per annum*. But if a man do let lands of the value of 20s. *per annum* till 21l. be levied of the issues and profits, this is but a lease at will, without livery; for it is not certain that the land shall be every year of one yearly value: for if a lease be made for so many years as J. at S. shall live, it is a good lease at will, but no lease for years, nor for life, without livery. 14 II. 8. 13 a. A parson did make a lease of his parsonage for five years, and so from five years to five years, during his life, as it is their common use to make leases; it hath been adjudged that after ten years this is but a lease at will; although the parson continue parson for many years longer. *Plowd.* 274 a.

And it seemeth in this place that the opinion of Littleton was, that if a lease be made to have and to hold at the will of the lessor, such a lease hath continuance, or may be determined at the will of the lessor only, and not at the pleasure of the lessee; *cujus est dare ejus est disponere*; and the first question or doubt moved in this point was in 10 II. 6. 1 a; but the better opinion of the book there is, that any lease at will is determinable, as well at the pleasure of the lessee, as of the lessor, and so it is 20 E. 4. 9. and

the reason there given is, because otherwise the lessee should have a freehold only by the assent of the lessor, which were against law, that estate of frank-tenement should be without livery.

And in 20 H. 7, in *Keilway*, 65, the same matter came again in question; and in 3 H. 8, *Keilw.* 162, a lease was made to R. H. to have and to hold at his own will; and it was holden by three Justices in the common bank, that this shall be taken at the will of both (*scil.*) the lessor and the lessee, for the reason and cause before alleged; and herewith doth agree 14 H. 8. 13, *Potkin's case*.

It appeareth also in this section, that although a demise be made to another expressly, or implied, to have and to hold at will, yet this doth not make a tenant at will, until, by force of such demise, the lessee be in possession, and no longer than he doth continue in the occupation thereof; for if he do not enter, or do waive the possession, it is sufficient proof that he is not contented to be tenant at will; therefore in an action of debt against tenant at will for rent reserved, it behoveth the plaintiff to surmise in his declaration, that the defendant hath entered and continually occupied by virtue of the said lease. 18 H. 6. 1. *Keilw.* 65 b. Otherwise it is of tenant for years. 28 H. 8. 14 b, *Dyer*.

Tenant at will hath a baser estate than tenant for term of years, for the uncertainty of his interest; but in the eye of the law tenant at will is of a better assent than tenant at sufferance is; for tenant at will hath his estate by the contract and free assent and consent of the lessor, but he that is tenant at sufferance occupieth the land of his own head, without any demise (as hereafter shall appear); and therefore Littleton saith, sect. 460, if a lease be made to a man to hold of the lessor at will, by force of which lease the lessee hath possession, if the lessor in this case do make a release unto the lessee of all his right, &c. this release is good, because of the privity which is between them; for in vain it were to make estate by livery of seisin, unto another, where he hath possession of the same tenements, by the demise and lease of the same person before. But a release made unto a tenant at sufferance, he saith, is void in law, because there is no privity between them. And a confirmation may be made by the lessor unto his lessee at will, with words to enlarge his estate; as if the lessor do make unto him a deed of feoffment of the same land, *habendum ei et hæredibus*, and no letter of attorney to make livery of seisin, it shall enure to him by way of confirmation. *Dyer*, 269 b. *Vide* 5 Co. 10 a. And the lessor may reserve a rent upon such a lease at will, and for it may distrain, or



have an action of debt, because of the contract, as he should have against his lessee for years. *Litt. sect. 72*; but he can have no remedy against tenant at sufferance for any rent, by default of privity, neither was there any contract between them. *Nota the case in Dyer, 173 a.*

It is not impertinent here to shew what acts do amount to a countermand or determination of a lease at will; and in this case Littleton saith; that if the lessor do expulse or put out his lessee it is a revocation (1) of his will; after which putting out, if he nevertheless do continue the possession for divers years, he is to all purposes in another plight than at the first, (*scil.*) but a tenant at sufferance, or a disseisor; if the lessor do say in the presence of divers men, that he doth revoke the lease that he hath made to J. at S. at his will, and that in the absence of his lessee, but doth not enter or expulse him from any part thereof, this is no determination of the lease; for there is a difference between an agreement and a disagreement to any thing; as for example, an attornment may be made in the absence of the grantee, as you may see in the chapter of Attornment; but in case of disagreement this must be made unto the party himself, as appeareth in *Wheeler's case*, 14 H. 8. 23; and the reason and cause of the diversity is, because in the case of disagreement the party may persuade and move the other by reason, by entreaty, or by other means, to give his consent and good will, and therefore the law doth require that the disagreement be made to the party, for the prejudice which might otherwise happen to him. 2 Co. 69 a. But if a man have two lessees, the one for years, the other at will, (all within one county) and the lessor doth make a feoffment of all the land in the same county, and doth make livery upon the land in lease for years, and put out in the name of all; in this case, although the lessee at will be but the party which he holdeth at will, and do keep the possession, yet both the lands doth pass, because this is a determination of his will. *Dyer, fo. 18.*

But if a man make a lease for years of divers parcels of land in one county, and the lessee for years make a lease of parcel thereof at will, whereof his lessee at will is in possession, and the lessor doth make a feoffment of all his land within the said county, and put out the tenant for years of parcel of that which is in his

(1) The word in the MS. seems to be "reversion."—*Ed.*

occupation, and there doth make livery of seisin according, but his lessee at will doth continue his possession, nothing doth pass of that land of which the other is tenant at will, unto the estranger, for so much as it is no determination of the will of the estranger, and so note the diversity. *Ibid. Dyer. Vide 2 Co. 32 a.*

If a man make a lease at will, and after the lessor doth command his servants or others to enter into the said land for him, this is a good determination of the lease at will, if they do enter according to such commandment, as the case is in 13 H. 7. 13. The Countess of Suffolk did enfeof the Archbishop of Canterbury and others of a park, and after took a lease of them at will, which lease so made, the bishop and others did command certain persons to enter in the said park, and to hunt and carry away deer there at their pleasure, and the Justices' opinion was, this command did avoid the lease at will. And in 2 R. 3. fo. 3 b, it is said, *de terrâ dimissâ ad voluntatem meam quam cito terra illa alicui alio demittetur, voluntas mea determinatur*: which words must be understood nevertheless after the second lessee or grantee doth enter according to his grant, for till then the first is in force, and he is capable of a release or confirmation, and also his lessor may recover his rent against his first lessee, which hath incurred since the latter grant, as it was judged, 20 Eliz.

If the lessor do bring an action of waste against his lessee at will, by the using this action his lease at will is determined, by the opinion of the court in the 14 H. 8. 12<sup>a</sup>; although an action of waste doth not lie against him by the law; for his interest is out of the statute of Gloucester, cap. 5, or any other statute, as shall appear afterwards; and although he did not commit any waste at all, yet because, by the nature of the action, the plaintiff is to recover the land wasted, besides his treble damages, it sufficeth to shew unto the court, that the intent and purpose of the lessor was to frustrate the interest of his lessee at will; but if the other doth bring an action for his rent behind, it seemeth by the user of this action, the lease at will is not determined; or if he do distrain for the rent behind, for the distress doth affirm him to be his lessee, except the lessor do also impound the distress in the same land, for then this making of that pound is a discharge of the lessee at will. 11 H. 7. 14 a. 21 H. 7. 39 b. If the lessee at will do commit voluntary waste, in pulling down houses, or in felling trees, and so doth take upon him to do such acts which none may do but the owner of the land, these do amount unto a determination of the will, and of his

possession. 5 Co. 13 b. The death or decease of the lessor or lessee at will is a determination of the will to all purposes. 21 H. 6. 37 b. Lessee at will took a new estate and interest of the same land by deed indented, *habendum et tenendum sibi et hæredibus suis*, but no warrant of attorney was to make livery in the deed, nor in any other *prout probare potuit*, and the indenture doth recite the former lease at will, and that it was surrendered, and that now it is cancelled; *et per hoc per opinionem curiæ*, the former interest made at will was determined, so that the second indenture could not enure as a confirmation, to give or enlarge fee simple to the lessee, as it should have done if he had been tenant at will. Vide 10 Eliz. 269 b, *Dyer*. If the lessor or lessee at will be outlawed, this is a determination of the lease at will. 5 Co. 116 b. But if two join in a lease at will, and one of the lessors die, yet the lessee doth continue tenant at will to the survivor to all purpose. And so if a lease at will be made to two, and one of the lessees dieth, yet the lease doth continue, and the survivor is chargeable for the whole rent. A woman seised in fee simple maketh a lease at will, reserving rent, she taketh a husband, this is no countermand of the lease at will; or if a lease at will be made to a woman sole, and she taketh a husband, this is no countermand of the lease at will, but it doth so continue to all purposes as before. 5 Co. 10. *Keilho*. 163. *Dyer*, 269 b. If a stranger do put out the lessee at will from his possession, and so disseise him in the reversion, this is also a determination of the lease at will, and the lessor from thenceforth hath no remedy against his lessee for his rent reserved. 14 H. 8. 12 b, *by Fitz.*; for when the lessor by his disseisin is put from his reversion *ex consequente*, he cannot be tenant to him, and it seemeth also to be a determination of the will of the lessee; because he doth not re-enter, and although he do re-enter, yet it seemeth he is now but tenant at sufferance; neither by his re-entry doth he continue the frank-tenement, and the reversion in his lessor, whereby he may have remedy for his rent formerly reserved, neither can the lessee at will by an action, re-continue his possession, for assize or *ejectio firmæ* he cannot have, for the uncertainty of his interest. 38 H. 6. 28.

Next followeth to see whether the lessee at will and his executors, &c. shall have the emblements after his lease determined, or he in the reversion; and first *nota* by Keble, on the construction of the statute of Merton, cap. 2, *omnes viduæ de cætero possunt legare blada*. *Blada* be such things as are annuals, as corn, hemp, flax,

and such like, and not herbs, grass, and such other things which will endure over a year. *Keilw.* 125 a. *Casus incerti temporis.*

And in this case is taught, that the lessee at will shall have the emblements; the cause and reason thereof is, because of the uncertainty of his estate, not knowing at the time of his sowing, but that he might continue his lease and occupation with the good-will of the lessor, till the said emblements were ripe and to be carried; and therefore, *à fortiori*, if such emblements be reaped, and so severed from the land, though they lie upon the land at the time when the lessor doth determine his will. But if the lessee at will, will determine his will before the severance of the blees, he shall not have the emblements, because he hath determined his interest by his own act and folly; also, if he commit voluntary waste in abutment of houses, or felling of timber trees, or do make a feoffment of the lands, and the lessor enter for any forfeiture, or if the lessee at will be outlawed, the king shall have the emblements; but if the lessor at will be outlawed, although by this the lease be determined, though the king thereby shall have the profits, yet the lessee shall have the emblements. 5 Co. 116, *Oland's case.* *Dyer*, 316 a. Write the case in *Dyer*, 173 a (1).

And the uncertainty of the interest in the lessee at will is the cause, that he shall have the emblements, unless his own act do cause the contrary. So and for the same reason it is, if tenant for life or *pour terme pendant vie*, or any claiming lawful interest from them, or from any of them, do sow the land and die, yet he in the reversion shall not have the emblements; as, a man seised in the right of his wife soweth the land and dieth, the executors of the husband shall have the crop. 46 Ass. pl. 2. *Vide Perk.* 99. But in 5 Co. 116 b. Note the case in 5 Co. 85, viz. tenant for life, the remainder in fee to Sir Henry Knivett, the tenant for life letteth for years, the lessee for years is ousted, and the tenant for life dis-

(1) It would appear that these words were inserted by the Commentator, after he had collected the other cases on the point, as a memorandum that the case in *Dyer* should be added; it is in substance as follows:—After an entry made by the servant of the lord, and by the lord's command, on the lessee at will, the tenant continued the occupation of the lands and sowed them; he subsequently paid the accustomed rent at the day of

payment, and severed the emblements, which the lord carried away, and on the issue to try the right the court thought, that if the disseisor sowed the land, and severed the product, and left it lying on the land, and the disseisee commanded his servant to take it away, that the disseisee shall have it as his own; for immediately by the entry it was remitted to the master, and no other entry is necessary.—*Ed.*

seised, and the disseisor letteth for years, and his lessee doth emblea the land, the tenant for life dieth; it is adjudged that Sir H. Knivett hath no right to the emblements, he being in the reversion of the land; also the lessee of the disseisor hath not mere *droit*, to them, he being in possession, and by whose interest the corn was sown; but the mere right of the emblements was adjudged in the lessee for years of the tenant for life, and he may have an action of trespass, and recover all the mean profits against the lessee of the disseisor. The reason is, because the lessee of the tenant for life hath the only right to the land, and therefore by consequence to the emblements, as a thing annexed unto the land, and the death of the lessee for life doth determine his interest to the land; but his right to emblements doth remain and continue *quicquid plantatur, seritur, vel ædificatur, solo cedit*.

And it is to be observed, the words are, if the lessee at will do emblea the land (that is) sow it with corn, flax, or hemp, so that it be but newly laid in the land, and before it be eared or seeded, the reversioner entereth, yet the lessee shall have the crop. *Swinburne*, 39. But if tenant at will do fallow, marle, and plough the land, and the lessor enter, he shall lose all that cost and labour. 11 H. 4. 9 b. *Vide* 13 H. 8. 16 a. *Shelley, contra*.

If tenant at will do sow the land with corn, and his lessor do enter, or otherwise determine his will before the corn be cut down, although the lessee at will may enter, cut down, and carry away his corn, yet he cannot lay it into any the barns or house-rooms of his lessor, till it be threshed, or make it up in stacks within that land.

And *nota*, the words are, viz. if the lessee do emblea his land; but if the land were sowed by the lessor at the time of the lease at will made, and the lessee find the corn upon the same land at the time of his entry, the lessor shall have it, whether it be reaped or still growing; but although the land was sowed with corn at the time of the lease at will made, yet if the lessee do continue his interest divers years, and then soweth the land, the lessor shall not by his entry gain any interest in the corn, but the lessee shall have it; but as concerning such things which arise out of the land, by its own nature and the providence of God, and not by the adjoining industry of the lessee, as grass, trees, or fruit, whether the lessor do find them fixed to the land or severed from it, and lying thereupon at the time of his entry, the lessor shall have all those and not the lessee. *Vide Herlakenden's case, in 4 Co. 63. 12 E. 4. 5 a.*

And in this respect Littleton sheweth the difference between lessee at will and lessee for years, the one having an uncertain, the other a certain interest; and therefore in many other cases there is a great diversity between their estates, and the lessee for years must beware in this behalf, that he do sow his land in such due time, that it shall be felled and mowed before the expiration of the lease; though the lessor do find them lying upon the land he shall not have them, but the lessee for years that was.

§ 69. Also, if a house be let to one to hold at will, by force whereof the lessee entereth into the house, and brings his household stuff into the same, and after the lessor puts him out, yet he shall have free entry, egress, and regress, into the said house by reasonable time to take away his goods and utensils. As if a man seised of a mease in fee simple, fee tail, or for life, hath certain goods within the said house, and makes his executors, and dieth; who-soever after his decease hath the house, his executors shall have free entry, egress, and regress, to carry out of the same house the goods of their testator by reasonable time.

In this section is shewed also that the lessee at will of a house may have free ingress to remove his goods and utensils *de maison*, after the entry of the lessor by reasonable time, and this must be understood as the former case of a lease, viz. in case when the lease is determined by the act of the lessor, and not by the lessee; for then he may not justify his free entry, egress, and regress, after the determination of his lease, but must either obtain licence of the lessor for the removing of his [goods], or is driven to sue a replevin according to his title.

And by this it may appear, that the law doth upon good causes and special cases, give liberty to a man to enter into another man's house or possessions, without the licence of the owner, and yet it is not punishable therefore in trespass, upon which ground note divers cases. *Plowd.* 71. But *nota*, although in this and other like cases the entry of the defendant be good matter of justification, yet if he in an action of trespass do plead not guilty, the plaintiff shall have judgment for the entry, though he shall be barred for the residue. *5 Co.* 85 *a.*

But these words, "free egress and regress," do not give liberty to break open the doors of the house, or windows, to enter, but only that he may enter by the gate when it is open: for the sheriff may enter into a man's house to do execution according to his writ, in all cases at the suit of any subject if the doors be open, otherwise not, and so it is of distresses to be taken in a house.—5 Co. 92 a.

But these words, "frank egress and regress," do imply so much, that if the goods and utensils be such quantity, that the lessee by himself cannot carry them away, and remove them, in such case he may enter with his servants, or with horses and cart. *Plowd.* 15 b. *Perk.* 23. 9 E. 4. 35. *Quando [aliquis] aliquid concedit, concedere videtur et id, sine quo res ipsa esse non potest.* 5 Co. 12, et 47.

Also, by this a man may observe the justice of the law, and that reasonableness thereof, not only for that it yieldeth to every man his own, but for the effecting of all affairs doth appoint convenient times; but in this case reasonable and convenient time is not definitely limited to any certain number of days, as in some other cases, and note in *Poliolbion*, 27 b.

But this is left to the determination of the Judges, as in the like case we do read in our books; 22 E. 4. 27, which see for the pleading. *Vide sect.* 109; and in *Plowd.* fo. 30 b; and *ibid.* 272 a.

To conclude this section, because this word "utensils" is mentioned, plate and jewels are [not] implied within this word "utensils," in a case of a legacy or testament. *Dyer*, 59 b; and *nota* in *Henry Swinburne's case of Testaments*, pt. 2. cap. 10. fo. 304 b, et seq. for the understanding of this word "utensils," household stuff, goods real or personal, whatsoever goods, chattels, &c. But in this case the lessee may remove them, or any other goods which he hath brought into his house; but if the lessee do set up or fix to his house wainscot or glass, or set up pale, he may not take them down or remove them. But if a dyer, brewer, or such men of occupation, be tenants at will, and do fix vats, furnaces, or tables dormant in the midst of the floor, and not to the walls of the house, if the lessor do determine the lease, it seemeth the lessee may remove those things so set by him for his occupation, in reasonable time after. 4 Co. 63. 21 H. 7. 2 b. And regularly the lessee at will may not remove or carry away with him no other things than such as in case the owner of them were seised of the land in fee, together with the same things, and died, they after his death should go to the executors, and not to the heir; for example, if tenant at will of a park

do store it with deer, or conies, or do store a dove-house with old doves, or the ponds with fish, and the lessor do determine his lease ; now the lessee by the law may not have free egress to carry away these things, for they do appertain to the heir and not to the executor. *Keilw.* 118 a.

And by occasion of these words mentioned, *bona et utensilia*, it is good to learn the extent of the word *bona*, or goods, which oftentimes is mentioned in testaments, and in other cases of forfeiture of a man's goods. *Vide inde Kitchin, fo. 32*, and of the word *catalla* or chattels, and in *Stamf. Prerog.* 45. It is easily to be collected by the words of this place, that Littleton's meaning was not, that every lessee for years should be barred of his emblements not ripe, or severed before the determination of his lease, but such lessees only as originally had certain time of commencement, and a certain time when his lease did end, whereof he is bound by the law to take notice at his peril. And therefore if tenant for life make a lease for years, and his lessee do sow the land with corn, and before the corn is severed his lessor dieth ; yet he in the reversion shall not reap and have the crop ; for the time when his lessor should die was to him uncertain, which by no policy or means the lessee could not prevent. And the case in 5 *Co. fo. 85*, was, tenant for life did make a lease for years, who is put out, and the tenant for life thereby disseised, and the disseisor doth let the same land to another for years, which last lessee doth sow the land, and the tenant for life dieth, he in the remainder in fee entereth ; it is adjudged, that he in the remainder hath no right to the crop. It was also resolved, that the lessee for life of the disseisor had no more right to the corn though it was sown by him. But mere right was in the lessee of the tenant for life, and he may have an action of trespass, and recover all the mesne profits against the lessee of the disseisor ; for the lessee of the tenant for life had right unto the [land], and by consequence unto the crop, as things annexed unto the land, (*quicquid plantatur scribitur aut ædificatur, solo cedit*) : and the death of the lessee for life doth determine his interest in the land, but his right in the crop doth remain, *causa qua supra* ; and in 5 *Co. 116*, the case was, a woman seised of land *durante viduitate sua*, doth make a lease for years, and the lessee doth sow the land, and after, his lessor took a husband ; in this case the lessee for years shall not have the crop, for although his estate is determined by the act of a stranger, yet he shall not be as in respect of the first lessor in better case than his lessor was.



§ 70. Also, if a man make a deed of feoffment to another of certain lands, and delivereth to him the deed, but not livery of seisin; in this case he to whom the deed is made, may enter into the land, and hold and occupy it at the will of him which made the deed, because it is proved by the words of the deed, that it is his will that the other should have the land; but he which made the deed may put him out when it pleaseth him.

For the understanding of these things I have observed, first, that although no frank-tenement can pass according as the charter doth import, for want of livery and seisin, yet by virtue of the charter, he to whom it was made may enter into the land, and hold at will, &c.

And the cause and reason thereof is, because the charter is good, and the agreement of the parties doth accord with the law, and it might take his full effect by livery and seisin subsequent, so there was a good foundation capable of a structure or building; but in the other cases, though the intent and agreement of the parties do in like sort appear, yet because the form of such conveyance cannot stand with the rules of the law, and by no subsequent act, as by livery or attornment, may be made good and perfect, if the grantee do enter by colour of such grant, he shall not be an occupier at will, but a disseisor. As for example, in *Buckler's case*, a charter of feoffment is made, *habendum* from the feast of St. Michael next ensuing, and livery and seisin, though it be made, the feoffor when he doth enter is not tenant at will, but a disseisor; *2 Co. 55 b*: for an estate of frank-tenement cannot commence *in futuro*.

If a man make such a charter of feoffment, and deliver unto him the charter, but no livery and seisin, if after the deed come to the possession of another by trover, the plaintiff in detinue must count, and declare, that he doth detain such a charter containing that J. at S. had enfeoffed him of the land comprised; for if he do declare of a charter by which J. at S. did enfeoff him, then his title is traversable by the defendant, and it shall be found against him. *2 H. 7. 1 b*.

If a certain rent were reserved upon such a deed and intended feoffment, where no livery and seisin was made, and nevertheless he to whom the charter is made doth enter, and occupieth as tenant at will; *quare* whether he shall pay any rent in that case?

If a man make such a charter, though he deliver the said charter upon the land, yet this doth not amount to a livery (1), unless he

(1) See *Co. Lit. 56 b.*—*Ed.*

do after add other words, as, "enter into the land, and God give you joy of it," or such like, then it is a good livery of the land, though it be out of the land, so it be within the view; *à fortiori*, when it is upon the land: 6 Co. 26 b: as before you may read in section 59, *in fine*.

If a man do make a charter of feoffment with warranty, deliver the deed to the feoffee, and after at another time do make livery *secundum formam chartæ*, now the warranty is good; and yet it may be objected, that when the deed was delivered, no estate did pass, to which the warranty might be annexed, nor no estate was in the feoffee upon which the deed may enure, as release with warranty; for the deed which doth comprehend the warranty, doth take effect *maintenant*, before the delivery of the deed, before the livery and seisin; and so upon nice construction, upon distinction of times, the warranty should be subverted; but the warranty is good. And in this and in other common assurances, *praxis juris peritorum est observanda*.

§ 71. Also, if a house be leased to hold at will, the lessee is not bound to sustain or repair the house, as tenant for term of years is tied. But if tenant at will commit voluntary waste, as in pulling down of houses, or in felling of trees, it is said that the lessor shall have an action of trespass for this against the lessee. As if I lend to one my sheep to tathe his land, or my oxen to plough the land, and he killeth my cattle, I may well have an action of trespass against him, notwithstanding the lending.

In this place is taught, that tenant at will is free from all manner of reparations; and see in 5 Co. 13 b, it is adjudged, that tenant at will is not punishable by any action for permissive waste; as if by negligence his house be consumed with fire; but the opinion of Littleton is there approved; if lessee at will commit voluntary waste, as in pulling down houses, or in felling of timber trees, a general action of trespass lieth against him; and see the book for the reason hereof, which is against the opinion of *Kitchin*, fo. 165 a.

Next it is to see what reparations tenant for years is compellable by the law to do; and it is agreed, that the authority of the termor in the making of reparations, is no other, but to repair small repairs; viz. to make splints, mud walls, hedges, and ditches; but not to make great and principal reparations, as principal timber, stone walls,

tiling; but covering with thatching he ought to do; and towards his reparations the lessee may fell timber trees, or dig stones out of the quarry, growing in or upon the said land, and justify it in an action of waste; but yet so that he doth first make request to the lessor in that behalf, because of the property which the lessor hath in them, being parcel of his inheritance; but if after notice or request the lessor be negligent, or deny it, then in his default, the lessee may fell down timber trees and repair. *Dyer*, 36.

But the lessee must pay the wages and the salary of the workmen at his own cost, and may not fell trees, and other such profit, and sell them, and with the money taken for the sale to pay the costs and charges of the reparations. *5 E. 4. 12 b.*

But if there be no trees or stone upon the land, and therefore, or for other causes, the lessee doth not take in hand to repair, &c. but suffer the house utterly to ruin, and fall down for the default of the lessor in not supplying timber, the lessee hath his remedy by action upon the case, *Ibid. in Dyer*. But *modus et conventio vincunt legem*, and therefore if by special covenant the lessor or the lessee be bound to the reparations, accordingly they must perform at their own expence, save that the lessee may take timber or stone growing upon the demise towards the same, when he is to do it, except by special words he be restrained. And also in case the lessor do covenant to do all reparations, and doth it not, the lessee may repair it himself, and stop so much of his rent in his hands; *quod fuit concessum*, *12 H. 8. [1. 2.] et Dyer, ibid.*

And for the case put in the conclusion of this section, see the authorities therein, from whence Littleton did ground this his opinion, viz. *22 E. 4. 5. 8 E. 4. 7. 15 E. 4. 20 b. Vide 11 Co. 82 a.* But *nota*, in *8 Co. 146 a*, resolved, that where entry, authority, or licence is given to any [one] by the law, and he do misuse it, he shall be a trespasser *ab initio*. But where entry, authority, or licence is given to any by the party, and he doth misuse it, there he shall be punished for the misdoing, but shall not be a trespasser *ab initio*; where read the reason of this diversity.

§ 72. Note, if the lessor upon a lease at will reserve to him a yearly rent, he may distrain for the rent behind, or have for this an action of debt at his own election.

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It hath been a question, how a yearly rent may be reserved upon a lease at will. *48 E. 3. 25 a.*

But by special words it may be, and yet no lease for years.—2 H. 6. 26. Note in the Old Book of Entries, *tit. Debt*, 175, the form of the count upon a lease at will. And the lessor hath the same remedy against lessee at will, as he [has] against lessee for years, for his rent. But if the lessee at will do leave his possession and determine his will, though but one day or two before the rent day, the lessor is without remedy for his rent; and it shall be adjudged the folly of the lessor to make such a lease: 20 E. 4. 9, *et Keilw.* 65 b: the reason is, because the rent reserved is to be raised upon the profits of the land, and is not due till the profits be taken by the lessee, therefore the lease being determined before the legal time of payment, no rent shall be paid; for there shall not be an apportionment in respect of part of the time.—10 Co. 128.

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LIB. I. CAP. IX.—TENANT AT WILL ACCORDING TO  
THE CUSTOM, *viz.* OF COPYHOLD LANDS.

§ 73. Tenant by copy of court roll is, as if a man be seised of a manor, within which manor there is a custom which hath been used time out of mind of man, that certain tenants within the same manor have used to have lands and tenements, to hold to them and their heirs in fee simple, or fee tail, or for term of life, &c. at the will of the lord according to the custom of the same manor.

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Coke, Chief Justice, in his 9th part, 76 b. [saith,] that the stile of a copyholder doth import three things, 1st. *Nomen*, his name; 2d. *Originem*, his commencement; 3d. *Titulum*, his assurance: his name is tenant by [copy of] court roll, for his name is not tenant by the court roll, but by the copy of the court roll, which is the only tenant in law that holdeth by the copy of any record, charter, deed, or of any other thing; 2d. his commencement, *ad voluntatem domini*; 3d. his title of assurance, *secundum consuetudinem manerii*; for the custom of the manor hath fixed his estate, and assured the land unto him, so long as he do the services and duties, and do perform the customs of the manor.

The doctrine of this chapter is with diligence to be apprehended, because great part of the land within this realm is in grant by copy, (3 Co. 8 b. 4 Co. 26 a.) except it be in Kent, for the copyhold land

is very rare there, and tenant-right not heard of at all. *Lambert's Kent*, fo. 14 a, and I suppose the reason wherefore copyhold land is rare there, [is, that there] is no villainies in Kent. 30 E. 1. tit. Villainage, 46, Fitz. for in ancient time, as Fitz. saith, in his *N. B. fol. 12, C*, copyholders were tenants in villainage. *Vide Lambert's Customs of Kent*, 52.

And in this section divers things are of necessary consideration, first, that there be a manor, parcel whereof hath been let by copy; secondly, that therewith hath run a custom. It is therefore necessary to declare what a manor is, and how manors did at the first commence. A manor is an inheritance of ancient continuance, consisting of demesnes, and service perquisites, casualties, things appendant and regardant, customs, liberties, &c. *Fulbeck's Parallel*, 18; and *Perkins*, fo. 128, doth describe it in this manner, (*scil.*) that the beginning of a manor was when the kings did give 1000 acres of land, or greater or lesser part of land, unto one of his subjects, and to his heirs, and the donee doth build a mansion-house upon one parcel of the same land, and of twenty acres parcel of it which remaineth, or of greater or lesser part of it, before the statute, did enfeof a stranger to hold of him and of his heirs, as of the same house, by the plowing of ten acres of land arable, parcel of that which remained in his possession, and doth enfeof others of other parcels, &c. for to carry dung to the land, &c. and doth enfeof others of other parcels, &c. for to go with him to war to Scotland, &c. and so by continuance of time it becomes a manor, &c.: and in *Plowd.* 169, it is said, that a manor, and the things appertaining to it, were made by continuance; for when a messuage was, and the inhabitants in it always have occupied such lands, meadow, and pasture, and have had such rents and services made to them, and have presented unto the advowson of the church, and men have made services to such inhabitants of the messuage, and have always demeaned themselves as villains, this continuance hath made it a manor, and hath made the advowson appendant, and the villains to be regardant unto the manor; for a man cannot make a manor at this day, although one do give lands to divers to hold of the donor by services and suit of court, whereby a tenure is created, yet he cannot make a court, for that cannot be but by prescription. 33 H. 8. Bro. tit. Copyhold, 31. *Tenures*, 102, Bro.; and the court did resolve, that a man by his own act cannot create a manor at this day. But by act of law one manor may become two manors, as it is agreed in 26 H. 8. 4 a, that if partition be made of a manor between

two coparceners, and upon the partition every of them have parcel of the demesnes, and parcel of the services. But if a man have a manor, and he doth grant parcel of the demesnes, and part of the services unto another, the grantee shall not have a manor; for a man by his own act cannot create a manor at this day, and so it appeareth *quod fortior et potentior est dispositio legis quam hominis*. 6 Co. 64 a. And there it was also resolved by the court, that if there be two coparceners of a manor, and upon partition the demesnes are allotted unto one, and the service to the other; in this case, although there is an absolute severance in fee simple, yet if one of them die without issue, and the demesnes do descend unto the other, that hath the services, the manor is revived again; because upon the partition they were in by act in law, so the demesnes and services were united again by act in law. But if a man seised in fee of a manor do thereof levy a fine upon grant and render, by which the demesnes only are rendered unto the cognizor in fee, although in this case there was no transmutation of possession, yet the demesnes being once by the act of the party absolutely severed in fee simple from the services of the manor, the manor is destroyed; and diversity was taken between the act of the parties, and the act of the law, as aforesaid; *vide* the same diversity in 5 Co. fo. 5 b, et 6 a, and note the case in 4 Co. 26 b, and in 6 Co. 64 b.

And if the lord of a manor do grant part of it, being ancient copyhold land, &c. and after the lord doth grant the inheritance of the said copyhold unto a stranger in fee, or of any other estate; now, by the severance, the copyhold land is not parcel of the manor, and by conveyance he cannot alien or surrender his estate; because he cannot alien it, but by surrender *in manus domini servitiorum*, as the custom hath warranted it, and that he cannot now do, nor the feoffor, &c. cannot make admittance or grant of a copyhold, for he is not *dominus pro tempore*. 4 Co. 24 b, 25 a.

If all the freeholds of the manor but one do escheat, or if the lord do purchase them, now it has become no manor; for there cannot be a court baron without suitors, and not before one suitor only. 23 H. 8. *Court Baron*, 22. *Bro. Suit*, 17. *Nota* 4 Co. 26 b.

But when the lord of a manor, having many ancient copyholds in one village, grants the inheritance of all the copyholds to another, the grantee may hold court for the customary tenements, and accept surrenders to the use of others, and make admittances and grants; for though that it is no manor in law, for that it wants freeholders, yet as to copyhold tenements the feoffee or grantee hath such a

manor that he may hold court and make admittances and grants of copyhold tenements; for every manor which consists of freeholders and copyhold tenants, comprehends in itself in effect two several courts, the one which is commonly called court baron, viz. the court of freeholders, and in this court the suitors, that is, to wit, freeholders are judges; and with this accords 7 H. 6. 3. 9. 39 H. 6. 5. 6 E. 4. 3. 12 H. 7. 16: another court is for copyhold tenants, and as to that the lord or the steward are judges; and as the other is called the freeholder's court, so the other may be called the copyholder's court; and for that, when the lord grants over the inheritance of his copyholds to another, the grantee may hold such court for the copyhold tenements only, as his grantor might; and as to this court it is not needful to have any freeholders, so if all the freeholders escheat, or if the lord release the tenor and services of all his freeholders, yet the lord may hold a customary court for the copyhold tenements, and make admittances and grants of them, *bene dicta est expositio quando res redimuntur à districtione*. Nota lector, that a lord may not by his own act make one manor at the common law, divers several manors consisting upon demesnes and freeholds; yet he may well by his own act make a customary manor as to divers purposes, and the court of a manor at what place it pleaseth him; but the steward of the court of a manor may not, at any court holden out of the manor, make grants or admittances. 4 Co. 26 b, et 27 a, fuit resolved, that if a *femme* tenant for life take a husband, and the husband commit waste against the custom of the manor, and die, the estate of the wife is utterly forfeited by the act of the husband; but if a stranger commit waste without the assent of the husband, this is no forfeiture.

And every copyhold estate in lands and tenements must stand upon two pillars, and without any one of them it cannot be supported; the one, that the lands or tenements be parcel of the manor, as is aforesaid; the other, that those lands and tenements have been demised and demisable from time whereof memory doth not run to the contrary; for the demesnes of the manor which always have been in the hands of the lord cannot be granted by copy, so the parcel of the manor and prescription be two incidents to every copyhold. 4 Co. 23, 24 a; which custom must be of such antiquity, that no man living doth know the contrary, either out of his own memory, or by any record or other proof, 3 Co. Pref. 2 b, and as this custom must be from beyond ever any beginning known, so must it have continuance always without interruption, *consuetudo semel reprobata*,

*non potest amplius induci*; for as continuance doth make a custom, so discontinuance doth destroy it. *Sir John Davies' R. fo. 33 b.*

So it is of homage ancestral, which is by prescription and continuance of the seignory in the blood of the lord, and of the tenancy in the blood of the tenant; for by one alienation only, the homage ancestral is gone, and the warranty is destroyed, and the reprisal of the same estate shall not reduce it. *Sir John Davies' R. fo. 36 b.*

For it hath been adjudged, if a copyhold estate be forfeited to the lord, or escheat, or doth otherwise come into the hands [of the lord], if the lord do make a lease thereof for years, or for life, or other estate by deed, or without deed, that this land can never afterward be granted by copy; for the custom is destroyed; because during such estates the land was not demised or demisable by copy of court roll. So if the lord do make a feoffment in fee of it upon condition, and afterwards he entereth for the condition broken, yet that land can never be re-granted by copy.

But if the lord do keep the land in his own hands by long time, or do let it but at will, he or his heirs or assigns may well re-grant it by copy at will, or at their pleasure. So if the interruption be wrongful, as if the lord be disseised, and the disseisor die seised, or if the land be recovered against the lord by false verdict, or erroneous judgment, in those cases till the land be recovered, or the judgment avoided, and reversed by the lord of the manor, the land was not demised nor demisable, and yet after the land is re-continued, it is grantable again by copy, for *non valet impedimentum quod de jure non fortiter effectum, et quod contra legem fit pro infecto habetur*. But if lands be forfeited or escheated, and without any new grant made, be extended upon a statute, or a recognizance acknowledged by the lord, or if the wife of the lord in a writ of dower have these lands assigned unto her, although these impediments be by act in law, yet for so much as these interruptions be lawful, the land never afterwards may be granted by copy. If a copyholder accept a lease of his lord for years, of his copyhold, the copyhold is destroyed for ever; if the copyholder takes a lease for years of the manor, by this the copyhold hath not continuance, as it was adjudged in *2 Co. 17 a.* But in that case it was resolved, that such a lessee might re-grant the copyhold again, for the land was demised or demisable, and if a copyhold be surrendered unto the lessee of the manor, or be forfeited unto him, his executors or assigns may well re-grant it again, and if a copyhold do escheat unto



the lord, and he doth alien the manor by a fine, feoffment, or otherwise, his alienee may re-grant his land by copy, for it was always demised or demisable. 4 Co. 31.

So that the custom of the manor is the soul and life of the copyhold estates; for without custom, or if they do break their customs, they are subject to the will of the lord; and by custom a copyholder is as well inheritable as he that hath frank-tenement at the common law, for *consuetudo est altera lex*. Customs from time out of mind may create and consolidate inheritances, for *consuetudo vincit communem legem*, and although in judgment of law a copyholder hath but estate at will, yet custom hath so established and fixed his estate, that it shall descend by the custom of the manor, and his heirs may inherit it, and therefore his estate is not merely *ad voluntatem domini*, but *ad voluntatem domini secundum consuetudinem manerii*, 4 Co. 21. And therefore the case was in 2 Co. 17, the king seised of a manor in fee in right of his crown, by his steward did grant copyhold lands parcel of the manor, unto one, by copy of court roll, according to the custom of the said manor, in fee, and after the king by his letters patent did grant the reversion thereof in fee unto another; and it was resolved that the severance of the inheritance and freehold of the land holden by copy from the manor, hath not extinguished or determined the copyhold estate; for the lord cannot determine the interest of the copyhold by any act that he may do, for so much as the land was parcel of the manor, and custom hath once established and fixed the copyhold estate, so that once it had both the incidents, therefore the severance made by the lord, after the estate had his perfection, shall not destroy the estate of the copyholder. 4 Co. 21. *Et vide* the consequence, *Ibid*. And to this purpose is the case in 8 Co. 63, where the king seised of the manor of Hannington, in the county of Wilts, within which manor were certain copyholders for lives, who by ancient custom have used to take all or any trees growing upon their copyhold lands, to be employed for fuel in his copyhold house, and for bounds and fences and other necessary reparations to be in and upon his lands and tenements customary, the king, of this manor did make a lease for twenty-one years, *exceptis omnibus boscis* [subboscis] *arboribus et maren*, &c. and the lessee of the said manor did by copy of court roll grant to J. at S. a house and verge of land for term of life, *secundum consuetudinem manerii*; and it was resolved by the court, that notwithstanding the severance by the exception, and although the defendant doth come in by a voluntary grant of the lord for

life, and not by surrender, yet such a grantee by copy shall have the estovers; for the estate of the copyholder, who cometh in by voluntary grant, is not derived out of the estate or interest of the lord of the manor, but is as an instrument to make the grant; but the custom of the manor after the grant made, doth establish and make it firm unto the grantee, so that although the grant were new, yet the title of the copyhold is ancient, and so ancient that it by force of the custom doth exceed the memory of man.

And Pasche, 26 Eliz. in the King's Bench, it was adjudged, if the lord take a wife, and afterwards doth grant land according to the custom, and dieth; his wife being endowed of the said land, amongst other, shall not avoid the estate by copy; for although her title of dower was before the grant, yet the title of the copyhold, which is the custom, is now older than the title of dower; and so the copyholder, which cometh in by voluntary grant, shall not be subjected to charges or incumbrances of the lord before the grant.

The third thing requisite is, that there be a lord of the manor by whose hands grants by copy have been made: 4 Co. 23 b, it was adjudged, that where the queen (the king's wife) was tenant for life of a manor, and a copyhold of inheritance doth escheat to her, the queen may grant this copyhold to whom she pleaseth, and this shall bind the king, his heirs and successors, for ever; for she was *domina pro tempore*, and the custom of the manor doth bind the king.

If the feoffee of a manor upon condition doth make voluntary grants of copyhold estates according to the custom, and after the condition is broken, and the feoffor do enter, yet the grants by copy shall stand; adjudged, *see in* 4 Co. 24 a.

*Nota*, it is to be observed, that a copyholder doth not derive his estate out of the estate or interest of the lord; for then the copyhold estate should cease, when the estate of the lord is determined; but the soul of the copyhold, and the life thereof, is the custom. 4 Co. 23 b.

It was resolved that when a copyholder doth surrender to the use of another, and the lord doth admit him, now he that is so admitted is in by him who made the surrender; and in a plaint in the nature of a writ of "entry in the per" shall be supposed "in the per" by him that made the surrender, for the lord is but an instrument to make the admittance, and he that is admitted shall not be subject to the charge and incumbrances of the lord. [4 Co. 27 b.]

If a surrender be made to the use of another and his heirs, if the lord will not admit him tenant, then the land doth remain in him who made the surrender. *Kitchin*, 89 *b*.

But if tenant by copy do surrender generally into the hands of the lord, and it doth not appear who shall have the land, nor to whose use it is surrendered, in this case the lord shall be seised to his own use. *Kitchin*, 88 *b*.

The words also in this section are, that certain tenants within the said manor have used to have lands and tenements, &c. whereupon the case was, that a copyholder of certain tenements, &c. called Collins, &c. parcel of the manor, &c. in pleading did allege, *quod infra manerium prædictum talis habetur, necnon a toto tempore cujus contrarii memoria hominum non existit, habebatur consuetudo, viz. quod quilibet tenentes prædictorum tenementorum vocatorum Collins, have used to have common in such a place parcel of the said manor; and if the custom may be alleged within the manor, and applied but to one copyhold, it was demurred in law; and it was adjudged that such a custom was good, for it may have a lawful commencement (scil.) that one copyholder alone may have common or estovers or other profit, only in the lands of the lord, and that in many manors some copyholders may have common in one waste of the manor, and others in other severally, so that the custom cannot be applied to all, and because all the other copyholders may be determined or extinct, therefore it was adjudged that the custom was well alleged.* 4 Co. 31 *b*.

Note the case in 4 Co. 31 *a*, Henry Jerningham, Esq. was lord of the manor of Mutford, in the county of Suffolk, and Taylor did claim the wood, of a great wood called Mutford Wood, parcel of the said manor, to be demised and demisable, from beyond time of memory, by copy of court roll, &c. to be cut down yearly by four or five acres at the most, and doth convey unto himself a grant of the said underwood by copy, &c. according to the custom; and it was adjudged in the Common Place, that underwood growing upon parcel of the manor, may by custom be granted by copy of court roll, and this judgment was affirmed in the King's Bench; for there it was said, that the said underwood might be granted by copy, because it doth grow upon parcel of the manor; also it is a thing of perpetuity, to which custom may extend, for after every fell or cutting down the underwood doth grow again *ex stipitibus*, and so it was resolved that herbage, or any profit of any parcel of the manor, may by custom be granted by copy; and it was said, that a fair ap-

pendant to the manor of Crokenhorn, in the county of Somerset, is granted by copy of the said manor.

*Nota Sir Henry Nevill's case*, 11 Co. 17 *b*, it was clearly resolved, *per totam curiam*, that a customary manor may be holden of another manor by copy of court roll of the manor, and such customary lord may hold courts and grant copies, and such a customary manor shall pass by surrender, and admittance and fines shall be paid upon admittance, as well upon alienation as upon surrender.

And because in this section and in section 76, amongst other things it is said, that by the custom of some manors, copyhold lands and tenements may be granted in tail, thereupon the opinion of some men have been, that an estate tail may be of copyhold lands by the custom of the manor. *See Plowden's opinion so in Manzell's case*, fo. 2 *b*. But for the better satisfaction of the reader herein, and for the clear understanding of Littleton's meaning herein, I have set down the argument made by Manwood, Chief Baron, as it is in 3 Co. fo. 8 *a*, *b*, where this rule was taken and agreed by all the court, that when an act of parliament doth alter the tenure service and interest of the land or other things [in prejudice of the lord, or of the custom of the manor, or (1)] in prejudice of the tenant, there the general words of such act of parliament shall not extend unto copyholders; but when an act is generally made for the commonwealth, and no prejudice may accrue by reason of alteration [of any] interest, service, tenure, or custom of the manor, there oftentimes copyhold and customary estates are within the general purview of such acts: and upon these grounds the Chief Baron did hold that the statute *de donis conditionalibus*, Westm. 2, doth not extend unto copyholders; for if the statute do alter the estate of the lands, this shall also be an alteration of the tenure, which is prejudicial to the lord; for of necessity the donee in tail of the lands must hold of the donor, and must do unto him such services without special reservation, as his donor doth unto his lord; and the point is adjudged according, *quod vide* 9 Co. 105 *a*. Secondly, Littleton saith, lib. 1. cap. 9. [s. 77.] that although some tenants by copy of court roll,

(1) These words are in the case referred to, and seem to have been omitted by an error of the transcriber, in running his eye from the word *prejudice*, which occurs twice, and omitting the intermediate words. It may be observed, once

for all, that where similar errors have been discovered, the omission has been supplied, without comment, though the words inserted have always been inserted within brackets.—*Ed.*

have estates of inheritance, yet they have them but at will of the lord, according to the course of the common law; for it is said, if the lord do put them out, they have no other remedy but to sue unto their lord by petition, and so the intent of the statute *de donis conditionalibus* was not to extend to the prejudice of the lord of such base estates, which as the law then was taken, was but at will of the lord; and the statute saith, *quod voluntas donatoris in charta doni sui manifeste expressa de cætero observetur*: so that which shall be intailed ought to be such an hereditament, which is given, or at least may be given, by deed or charter in tail. Third, for so much as great part of the land within the realm is in grant by copy, it should be a thing inconvenient, and cause of great suit and contention, that copyholds should be intailed, and yet neither fine nor common recovery should bar it; so that he that hath such an estate, could not, without the assent of the lord, by making of a forfeiture, and by taking a new grant, of himself dispose of it, either for the payment of his debts or for advancement of his wife, or younger issues; wherefore it seemed unto him, that the statute *de donis conditionalibus* doth not extend unto copyholders, *quod fuit concessum per totam curiam*; and the Chief Baron saith, moreover, that if the statute without custom, do not extend unto copyholders, without question custom of the manor cannot make it to extend unto them, for before the statute all estates of inheritance, as Littleton saith, were fee simple, (lib. 1. cap. 2;) and after the statute no custom may commence, because the statute being made 13 E. 1. is made within time of memory; *ergo*, estate tail cannot be created by custom, and therefore Littleton is to be understood (for so much as he doth ground his opinion, that copyholds may be granted in fee simple or fee tail) of a fee simple conditional at the common law; for Littleton did know well, that no custom might commence after the statute of Westm. 2, as it doth appear in his own book, lib. 2. cap. 10. sect. 170, and 34 H. 6. 36; and where he saith, sect. 76, that *formedon* in descender doth lie, he also saith, that this doth lie *ad communem legem*, and it appeareth in our books, that in special cases *formedon* in descender did lie at the common law before the statute of Westm. 2; *quod vide* 4 E. 2. tit. *Formedon*, 50. 10 E. 2. tit. *Formedon*, 55. 21 E. 3. 47. *Plowd. Com.* 246 b. And it was further said by the Chief Baron, that where the custom of the manor is to grant lands by copy in *scodo simplici*, without question lands may be granted by the same custom unto one and to the heirs of his body, or upon any other limitation or con-

dition; for these be estates in fee simple; *et eo potius*, because they be not so large and ample as the general and absolute fee simple is, but not *è converso, ad quod non fuit responsum*: but *vide 4 Co. 23 a*, this last point is adjudged according. *Vide Kitchen, fo. 88 b.*

§ 74. And such a tenant may not alien his land by deed, for then the lord may enter as into a thing forfeited unto him. But if he will alien his land to another, it behoveth him after the custom to surrender the tenements in court, &c. into the hands of the lord, to the use of him that shall have the estate, in this form, or to this effect:

A. of B. cometh into this court, and surrendereth in the same court a mease, &c. into the hands of the lord, to the use of C. of D. and his heirs, or the heirs issuing of his body, or for term of life, &c. And upon that cometh the aforesaid C. of D. and taketh of the lord in the same court the aforesaid mease, &c. To have and to hold to him and to his heirs, or to him and to his heirs, issuing of his body, or to him for term of life, at the lord's will, after the custom of the manor, to do and yield therefore the rents, services, and customs thereof before due and accustomed, &c. and giveth the lord for a fine, &c. and maketh unto the lord his fealty, &c.

Now followeth to be observed, that it is a forfeiture of a copyhold estate to alien otherwise than by surrender.

The words are, that such a tenant may not alien his lands by deed, upon which words some have collected, that if he alien them without deed, it is no forfeiture; but the law is otherwise; for if a copyholder do make an estate for life, or a feoffment by words, and do make livery, it is a forfeiture; *Kitchen*, 91; and may be resembled to this case, 206, viz. if the lord do make a feoffment to his villain of any lands or tenements, with or without deed, and to him doth make livery and seisin, it is an enfranchisement. But in case of copyhold, though the copyholder do make a deed of feoffment, and yet maketh no livery, this is no forfeiture, for if the feoffee enter by force of the deed, he is but tenant at will. *Kitchen, ibid.* If a copyholder for life do surrender unto the use of another in fee, this is no forfeiture, for it passeth by surrender unto the lord, and

not by livery. 4 Co. 23 a. If tenant by copy do by indenture bargain and sell his copyhold land, which is inrolled within six months, it seemeth this is no forfeiture, because the stat. 27 H. 8, cap. 16, for uniting of the possession unto uses, doth not extend unto such tenures. *Vide Kitchin*, 87 a.

And by the custom of the realm, which is the common law, every copyholder may make a lease of his copyhold for one year, without any particular custom. 9 Co. 75. But if a copyholder do lease or demise his copyhold land for any number of years, without deed, whether this be a forfeiture or no, this is more questionable: in the one part it seemeth to be a forfeiture, because to the perfection of a lease for years, neither deed nor livery is necessary; but against this reason, the authority of Littleton is alleged, sect. 205, where the lord doth make a lease for years by his deed to a villain, it is an enfranchisement, and comparing the subsequent case unto it, it seemeth to others that without deed such a demise is no enfranchisement, *Kitchin*, 124 a; and therefore see in case *ut supra*.

And forfeitures are not favored in law, but are strictly to be taken. Note 7 Co. 58, *Maud's case*; and therefore, although the case in Littleton, sect. 233, if the tenant be not ready upon demand to pay a rent seck, nor if the tenant, or any other for him, be upon the land to pay the said rent seck, when it is demanded, this is a denial in law, and a disseisin of the rent *in fait*, yet such a denial of the rent or other services by the tenant by copy, is no forfeiture, but it must be plain denial, and not by inference. *Kitchin*, 90 b. fo. 124 a. *Et vide* 42 E. 3. fo. 25.

Also, if one within the view of the copyhold say unto one, I will not put you out during your life, or within the copyhold he saith, I am content you shall have my copyhold land for term of your life, this is no forfeiture; or if a copyholder be in prison by divers years, and by that means he cometh not to do his suit at divers courts, but is absent, yet this is no forfeiture of his copyhold; the same law is, if his rent be demanded on the land, and he is in prison in the gaol, this is no forfeiture; the same law is, if he be much in debt, and in fear to be arrested; or if one be bankrupt and doth keep his house, and doth not come to the lord's court, but make divers defaults these are no forfeitures of his copyhold; the same law is, if he be let by infirmity to come to the court of the lord, or to pay his rent, this is no forfeiture, *Kitchin*, *ibid*. John at Stile seised in fee of an acre in Dale by charter, and of another by copy, and doth make a feoffment and livery in the acre by charter, in the

name of both, it is no forfeiture of the acre by copy; but if he make livery in the acre by copy in the name of both, the land by charter doth pass, and it is also a forfeiture of the acre by copy, *Kitchin*, 125. If one by indenture doth bargain and sell all his lands, tenements, and hereditaments in Dale, and doth enrol it according to the statute of 27 H. 8. cap. 16, and he hath in Dale lands holden by charter, and other lands by copy, and afterwards he levieth a fine, and suffereth a recovery accordingly, yet the copyhold is not forfeited, *Kitchin*, 123 *b*. If a copyholder be seised by force of three several copies, and after committeth a forfeiture in any part of one of the copyholds, by this all that one copyhold is forfeited, but this is no forfeiture of the other two copyholds. So if the copyholder of three copyholds do surrender them all to the use of one A. and his heirs, he is admitted accordingly *tenendum per antiqua scripta* [*inde prius debita et*] *jure consueti*, or to the like effect, and after A. doth make a forfeiture in one of the copyholds only, he shall forfeit that copyhold only, and not the others; for the *tenendum* (*reddendo singula singulis*) doth continue the several tenures; and so it is not material if the three copyholds be in one, or in several copies; but whether tenures be one or several, is only material as unto this purpose, 4 *Co.* 27; contrary to the opinion of *Kitchin*, 87 *a*.

If the estate of the lord of a manor do cease by a limitation of a use, and the use and estate of it is transferred unto another, who doth demand the rent of a copyholder, and he denies to pay unto him, this is no forfeiture without notice given to the copyholder of the alteration of the use and estate: adjudged 1 *Jac.* as appeareth in 8 *Co.* 92 *a*.

The words are, that in such a case of alienation contrary to the custom, the lord may enter for the forfeiture, whereupon two things are observable; first, that none shall take the advantage of a forfeiture, but the lord only: for if a copyholder for life, where the reversion is over for life, doth commit a forfeiture, he in the remainder shall not enter, but the lord, and he shall retain it during the life of him that did commit the forfeiture; but this shall not destroy the remainder without express custom in that case; and tenant by copy for life, where the remainder is over, may surrender unto the lord, and he in the remainder shall not enter till after his death; for his estate is to commence in possession *post mortem*, and no incident at the common law doth appertain unto him unless by custom. *Vide* 9 *Co.* 107 *a*. Surrenders by copyhold are not to be compared to surrenders at the common law.



The words in this section are as before recited, and the opinion is, that in this case of alienation the lord may enter without any presentment be thereof made by the homage, as in cases where the copyholder is attainted of felony or treason, for those forfeitures are notorious and apparent to be against the custom.

But if a copyholder do make waste, contrary to the custom, or do deny to pay his rent or other service, of those forfeitures it behoveth first to be a presentment found by the homage, before the lord may enter. *Kitchin*, 90 b.

And it is to be observed, that although Littleton in this place sheweth, that a copyholder cannot alien his copyhold land, but by surrender, upon pain of forfeiture, yet in a special case he cannot alien it by surrender or by any other means. *See Sect. 362.* As if the lord grant the inheritance of the said copyhold unto a stranger in fee, in this case suit of court and fine upon alienation is gone, and the copyholder thereof utterly discharged; for by the grant of the fee simple of the copyhold, the land is severed from the manor; and he cannot surrender or alien his estate, but by surrender *in manus domini servitiorum*; and this he cannot do now, nor that feoffee cannot thereof make admittance or grant of the copyhold; for he is not *dominus pro tempore*. 4 Co. 24 b.

And note, that after the lord hath entered lawfully, because of any forfeiture, from thenceforth the copyholder is no longer tenant by copy according to the custom of the manor, but is merely tenant at will to the lord, or as a tenant at sufferance; if peradventure the lord doth permit him still to be occupier of the land. 4 Co. 21 b. *Vide Dyer*, 173. But the land remaineth still demisable by copy.

If a copyholder do commit a forfeiture, and afterwards before presentment made thereof, or other notice given to the lord, he doth accept his rent and other service, it seemeth the lord is not concluded by such acceptance, but afterwards upon presentment made of such former forfeiture, he may enter, as in the case in 8 Co. 92 a. But if waste be done by the father, *quære* whether the son shall lose the land after his admittance; some say it is a forfeiture which doth run with the land, others say that it was committed by the father, and therefore personal. *Kitchin*, 86 b. *Vide ut sequitur*.

But if after such a forfeiture committed, the copyholder surrender to the use of J. at Stile, who accordingly is thereunto admitted, it seemeth in this case the lord cannot enter and put out J. at S. contrary to his own grant and admittance. *Vide Kitchin*, 90 b, *in fine*.

If a copyholder suffer a recovery against him at the common law, and after do surrender unto another, who is admitted, and after one or two admittances do pass upon surrender, yet after, when the lord doth know of the forfeiture, he may well seise it for this forfeiture, because the copyhold was destroyed by this forfeiture; but otherwise it is if the forfeiture do not destroy the copyhold, as if he do make waste, or do break any custom, the lord is barred by his admittance, *ut supra*. *Kitchin*, 125 *a*.

The form how surrenders and admittance of copyholders are made, Littleton doth here exemplify, which is an excellent kind of teaching, and by the young student to be marked; and so doth he in the chapter of Releases, and of Confirmations, shew the form how they are made, and in his chapter of Estates upon Condition, which commonly are by indenture, shew and teach the form of framing and making of them; and in this precedent it may appear, that the admittance of the lord must always be pursuant and according to such estate, as is limited by the surrender. *Vide Sect. 79, according*. Therefore the case was in 4 Co. 28 *a*, Alice W. was copyholder in tenements in which, &c. in fee, holden of the manor of P. L. in the county of Bucks, and 12 H. 8. did surrender the tenements in the hand of the lord of the manor, unto the use of W. W. her son, in fee, and at the next court, holden 13 H. 8. for the said manor, was in the entry of the roll to this effect; *ad hanc curiam venerunt Will. W. et Johanna uxor ejus, et ceperunt de domino tenementa prædicta cum pertinentiis in quibus, &c. præf. W. W. et Johanna uxor ejus tenenda eisdem W. et J. et hæredibus suis, &c.*: and after W. died, and Joan his wife did survive, and surrender the tenement unto the use of the defendants, who did enter, upon whom the plaintiff, as cousin and heir of W. W. did enter, and the defendants did re-enter, and the plaintiff brought an action of trespass, and all this was found by special verdict; and the court did resolve, that when A. W. did surrender the land into the hands of the lord unto the use of W. W. &c., the lord by custom, which doth make the law in such cases, hath but a customary power to make admittance *secundum formam sarsum redditionis*, and he that is admitted shall be in by him who made the surrender, and not by the lord; and therefore it was agreed, *per totam curiam*, if the lord, after such surrender, will grant the land unto *cestui que use*, and to a stranger, all shall enure unto *cestui que use*; or if the lord do admit *cestui que use* upon condition, the condition is void, for

after admittance he is in by him that made the surrender; as if a man do devise a term of years unto J. at S. and the executors do agree that J. S. and J. N. shall have the term, or that J. at S. shall have it upon condition, in these cases J. at S. shall have the term only and absolutely; for after the assent of the executors, he is in by the devise; and it was said, that it hath been lately adjudged, that where a copyholder doth surrender into the hands of the lord, to the use of another for life, and the lord doth admit him to hold to him and his heirs, he that so is admitted hath estate but for life; for he is in after admittance by force of the surrender. *Vide ibid.* 29 b.

Also, it doth appear in this precedent, that the fine due to the lord, is to be paid upon the admittance of the copyholder; and Popham, Chief Justice, said, that it was adjudged in Sandes' case that no fine is due to the lord either upon surrender, or descent, till admittance; for the admittance is the cause of fine; and if after the tenant deny to pay the fine, this is a forfeiture, 4 Co. 28 a; and in *Kitchin*, 122 a. he saith, note it is commonly said, and the ground to pay fine is, that a fine is due unto the lord upon every alienation, and change of the tenant, (*scilicet*.) upon every admittance of every new tenant unto the lord by copy, as by every alienation upon surrender, and admittance thereupon; and upon every descent, and admittance upon it: if a copyholder surrender to the use of his wife for life, the remainder to him and to his heirs, and after the husband do surrender to the use of John-at-Style, and his heirs, and dieth, the widow may enter, by the opinion of Dyer, and Manson, Justice, and shall hold the land for her life, but the heirs of the husband are bound. But in this case no fine is to be paid by J. at S. or his heirs, during the life of the woman, for till then, there was no alteration of the tenant. *See in Kitchin*, 88; and in 4 Co. 31. *Non valet id quod de jure non sortitur ad effectum*.

Also, if a copyholder do surrender in the hands of the lord, unto the use of divers and their heirs, as unto two, three, or four, and their heirs, upon the admittance of them, the lord shall have but one fine; for it is but one surrender, and one admittance of one tenant; and upon the death of the suitor, and the admittance of his heir, then another fine; and therefore if two be admitted, and the one dieth, the other shall have his part by surrender, without new admittance or payment of any fine. Also, where surrender is made to the husband and the wife, and to the heirs of the husband, upon their admittance the lord shall have but one fine, for it is one sur-

render, and both do make but one new tenant, and after the death of the husband and the wife, upon admittance of the heirs, the lord shall then have another fine.

But within some manors the custom is, *quod [ille] vel illa, qui vel quæ primus vel prima nominat' foret in tali copia*, shall have the lands and tenements to him only, and solely for his life, and he that was secondly named shall have it only for his life, *post mortem* of him who was the first tenant, and so the third after the death of the second; 9 Co. 104a. And in such manors it seemeth that the custom may be, that every of them shall pay several fines.

Also, where surrender is made unto one for life, and after his death the remainder to another, *et hæredibus* of his body engendered, and for default of such issue, the remainder unto a third, and his heirs; in this case, the admittance of the tenant for life doth vest the remainder in all [the] others; and divers learned stewards use to take but one fine only, at the admittance of tenants for term of life, and nothing of those two in remainder, when the remainder doth fall; but I have seen that every of them in the remainder, when they come to the land, have made fines, though not the whole fine but a moiety, and every of them have been admitted when the remainder [falls], but it need not; for by the [death] of tenant for life the remainder is so vested, that he in the remainder need not to have admittance, and they but one estate and one surrender.

The same law is, where a surrender is to one for life, the remainder unto another and his heirs, there shall be but one fine, but then it is good, that both be admitted together, according to the surrender, at the time of the surrender made. And it is adjudged, that the admittance of the tenant for term of life, is the admittance of him in the remainder, but not to prejudice the lord of his fine, which was due by custom of the manor. Also, when the custom is, that for every cottage, and for every messuage, the lord shall have upon every alienation and admittance of the tenant for one fine 3s.; and there, if the cottage or the messuage is decayed, it is called a "hampstall;" and by the custom also of every hampstall he shall have for fine 3s.; there if the tenant doth make of one house, two houses, or do build new houses, he shall not pay a fine for those new houses, nor for two houses, where before was but one, for the prescription doth not hold place, but for the old houses.

Also, where the custom is, that for a fine for a licence to demise for years, the tenant shall pay for every messuage, which he doth

demise for every year, for which he hath licence, 4*d.*; thereof if he do make of one house divers cottages, as of the barns and stables, there, for the licence to demise his messuage, he shall only pay but 4*d.* for every year, for which he hath licence to demise the whole, and not for divers houses, for otherwise the prescription doth not hold place.

Also, if tenant for life, and he in the remainder, or reversion, do join in surrender to one and his heirs, he to whose use the surrender is made shall pay but one fine; for there is but one admittance, and not several, and one surrender, and not several, and but one tenant is admitted; the same law [is] where two joint-tenants in common or two coparceners do surrender unto one and to his heirs, there shall be paid but one fine.

Also, where a woman is espoused a virgin, where she shall have all for her dower by the custom, there it is used that he shall pay a fine, and it is reason, because she is admitted; and so it is where a woman hath a third part by the custom for her dower; but in that case common use is to pay but half the fine, which is paid for the inheritance; but custom of the manor is to be considered in this case. If a copyhold be surrendered upon condition, and the condition is broken, he that did surrender may enter without paying fine, or new admittance. *Vide Kitchin, 122, et seq.*

If the fines of copyholders of a manor upon admittance be uncertain, yet the lord cannot exact or demand excessive or unreasonable fines, and if he do, the copyholder by the law may deny to pay it, without any forfeiture, and it shall be determined by the Justices before whom the matter is depending, or upon demurrer, or upon the evidence to a jury, upon the confession or proof of the yearly value of the land, whether the fine demanded were reasonable or not; for if the lords may assess fines excessively at their pleasures, all the estates of copyholders, which are a great part of the realm, and which have continued time out of memory, should now at the will of the lord be defeated and destroyed, which were inconvenient. 4 Co. 17*b.* 11 Co. 41*a.*

Note the statute *de Prerogativa Regis, cap. 4.* If the widow of the king's tenant do marry without the king's licence, she shall make a fine at the king's will; *et illa voluntas æstimari consuevit ad valentiam tenementi per unum annum. Ad plus, vide Stamf. Prerog. cap. 4.*

A copyholder is not bound to pay an uncertain fine by and by, because he could not know what fine the lord would assess, *et nemo*

*tenetur dirinare*; and therefore he shall have convenient time to pay it, if the lord himself do limit no certain day for the payment of it, but otherwise it is of fines certain. *Ideo caveat emptor.*

It was also resolved, where a copyholder hath divers several lands, severally holden by services by copy, the lord ought to assess and demand fines severally, for every parcel which is so severally holden; for the tenant may refuse to pay the fine for one parcel, and forfeit it, and pay the fine for the others; for every several tenure hath several conditions in law *tacite* annexed unto it.

So if all the said several copies be surrendered unto the use of one other and his heirs, and the lord admit him, *tenendum per antiqua servitia, inde prius debita et de jure consueta*, there the tenures be several, and therefore the fines ought to be severally assessed and demanded. 4 Co. 28a.

Note, as he, to whose use a surrender is made, may be admitted by attorney, so a copyholder may surrender by attorney in open court; and the case of *cestui que use* is a more harder case, because he that is admitted is to do fealty, which none can do but he that shall be admitted, and therefore in that case the lord may refuse to admit him by attorney. But if he do admit him by attorney, it is good enough, for it should be hard if a man imprisoned, languishing, or beyond sea, might not make a surrender of the copyhold land, either for the payment of their debts, or for preferment or advancement of their wives or children. 9 Co. 76a, b.

§ 75. And these tenants are called tenants by copy of court roll; because they have no other evidence concerning their tenements, but only the copies of court rolls.

The evidences of a man be, as the sinews of his land, 5 Co. 74b. And Littleton saith, such tenants be called tenants by copy of court roll, because they have no other evidence concerning their tenements, but the copies of the court rolls. Nevertheless it hath been resolved in 4 Co. 25b. if the lord of the manor do admit one a copyholder without title, or lawful surrender, or presentment, viz. to him or to his heirs, and he that hath right by his deed doth release unto him, being then in possession, that this release doth extinct the right of the copyhold; the reason is, because he to whom the release was made, was admitted unto the tenements, and a copy-

holder in possession, so that a release of the customary right may enure unto him; also, the lord hath not any prejudice thereby, for he hath had his fine upon the admittance, and he, to whom the release was made, was in by title (*scill.*) by the admittance of the lord, and so the release doth enure by way of extinguishment.

But if a copyholder be put out by one by wrong, there his release by deed to the disseisor, or other wrong-doer, doth not transfer his right, nor bar him, for two causes: 1. because he hath not any customary estate upon which the release of the customary right may enure: 2. this should be prejudicial to the lord, for by this he should lose his fine and services. And for these causes, the release by deed in that case is utterly void; and this is not against any thing which Littleton saith; for he doth speak of an alienation by surrender, and this of necessity must be into the hands of the lord according to the custom. But the release in the first case could not be made unto the lord, but unto the copyhold tenant in possession. Also, he who claimeth a copyhold estate by surrender, hath no other evidence but copies, and so be the words of Littleton to be understood; but he who claimeth extinguishment of a right, may have it by deed, although, on the contrary part, it was said, that he that doth purchase copyhold lands, may, upon search in the rolls, know if the title of the land be good; but if a release by deed shall extinct rights, then this will be great peril to the purchasers, for it appeareth not in the rolls; to which objection it was answered by the court, that there was not any peril; for if the copyholder that is in possession do sell, he will shew unto the purchaser the release made unto him, and he that is out of possession, ought not to sell it, till he hath regained the possession; and if any will purchase titles, he is not to be favored, but *caveat emptor*; and yet he that hath made the release may and ought to acquaint the purchaser with that which he himself did make, and so no mischief.

But if tenant by copy doth let for years by licence of the lord, and after do release unto the lessee by these words, in the Court, *remisisse et relaxasse*, this is void; because it ought to be surrendered in the hands of the lord, and then the lord ought to grant the reversion unto the lessee; for, as Littleton saith, it cannot pass but by surrender, and yet a release is used of a copyhold in the court, in the presence of the steward. *Kitchin*, 81 b. *et vide ibid*, 86 b. *in fine*.

§ 76. And such tenants shall neither implead nor be impleaded for their tenements by the king's writ. But if they will implead others for their tenements, they shall have a plaint entered in the lord's court in this form, or to this effect: "A. of B. complains against C. of D. of a plea of land, viz. of one messuage, forty acres of land, four acres of meadow, &c. with the appurtenances, and makes protestation to follow this complaint in the nature of the king's writ of assize of mort d'ancestor at the common law, or, of an assize of novel disseisin, or formedon in the descender at the common law, or in the nature of any other writ, &c." Pledges to prosecute F. G. &c.

The reason and cause wherefore copyholders may not implead or be impleaded for their copyhold tenements in the king's court, but only in the court of the lord by plaint, is, for that such copyholders have no estate and frank-tenement, but are as tenants at will of the lords, and having originally received their interest by the free gift of the lord, they are by custom bound to appeal to him only for justice, touching those lands; but *nota*, in 4 Co. 26, that a lessee of a copyhold for years may maintain an *ejectio firmæ* at the common law in the king's court.

The form of the plaint is here set down, and how therein he is to make protestation, in the nature of what writ he will follow his said plaint, and according to that writ in form and estate, as it is to be presented by the order of the common law, so must his plaint be. *Vide Kitchin*, 217, 248.

And it is hereby to be observed, if the plaint doth contain several things, as a messuage, land, meadow, pasture, &c. the form is, that the most worthy thing must be first mentioned, and so the rest in their degree; and if you be desirous to know the reason thereof, read it in *Plowden*, in *Hill and Grange's case*. But to declare the form and order of all the real actions is not necessary in this place, and would require a large discourse. *Fitz. N. B. 2. Theloall*. 119. *Plowd*. 169 a. and in 11 Co. 52 a.

*Plegii dicuntur personæ, qui se obligant ad hoc, ad quod qui eos mittit, tenebatur. Dr. Cowell's Interp. verbo Pledge.*

And in ancient time before the Conquest, the law was, and so is at this day, that none should take forth out of the king's court of Chancery any original against another, or make any plaint in any



court baron, to the grievance or vexation of any defendant, but under pledges or sureties, that he had good causes of action or complaint, for in original writs, we find it thus, *Rex vicecomiti, &c. salutem, &c. si A. fecerit te securum de clamere suo proseguendo tunc summo I. S. &c. Vide Finch, li. 3. fo. 53a.*

If the plaintiff be nonsuit in action, and therefore the pledge amerced, this amercement should not be for the defendant, in recompence of his unjust molestation, but are to the only benefit of the lord of the court; and the said amercement is not set or assessed in regard, or proportionable to the prejudice done to the defendant, but only in respect of the offence done unto the court. *Fitz. N. B. 75 E.*

But as this thing is now used, these pledges are put into original writs only for form, and of course not naming in truth sufficient men or any known pledges, that are *in rerum natura*, but common and feigned names, as, John Denn and Richard Fenn; John Doe and Richard Roe, or such like fictions; and yet, nevertheless, this form is so requisite to be used, that if the plaintiff do omit in his writ original to name such pledges, the sheriff need not to do any thing touching the execution of the said writ, but may well return that the plaintiff *non invenit sibi plegios*. But for so much as the nominating of pledges in the writ, is but of form and course, therefore, if they have been omitted in the writ before the ensealing thereof, they may be put in afterwards, either in the presence of the sheriff, or of the justices unto whose courts the said writ is returnable. *Fitz. N. B. 38. 21 H. 7. 14b. 18 E. 4. 9b. and nota, 2 H. 7. fo. 1a.*

And because amerciements, assessed upon the plaintiff and his pledges, were for the particular benefit of the king, or other lords, in whose courts such actions were unjustly pursued, therefore many times it happened that they were more grievous than the quality of the offence or contempt required; and for remedy thereof, the statute was made, *liber homo non amercietur pro parvo delicto nisi secundum modum illius delicti*: and the said amerciements *non ponantur nisi per sacramentum proborum et legalium hominum de vicineto*. *Magna Charta, cap. 14. Westm. cap. 18.* which are commonly termed officers of the amercement, who, in a court baron, are two (at the least) of the freeholders, and in the king's court how their course is, you may read in our books. *Fitz. N. B. 76.*

And as by these amerciements, the rashness of the plaintiff was in some sort checked, and the dislike which the courts of justice

did take against unjust complaints did also appear; so in time, as the malice of men did increase, good positive laws and statutes have been made for the restraint of wrong-doers, and to give costs and amends unto the defendant against his unjust accuser, according to the saying, *ex malis moribus, bonæ leges nascuntur*. 23 H. 8. cap. 15. 4 Jac. cap. 3.

And this [is] agreeable to the law, and to the word of God, that he that wrongfully pursueth another for trespass or crime, if the accusation fall out unjust, shall make recompence unto him that was unjustly pursued. *Leviticus*, xxiv. 20. *Deuteronomy*, xix. 16.

It is also provided by statute laws, that he that will complain of another in the Chancery, or before the king's council, shall put in sureties to render damage unto the defendant, if he prove not his bill true. 17 R. 2. cap. 6. 15 H. 6. cap. 4. *Subpœna*, 24. *Brooke*. But *nota*, *non est in usu* at this day to find sureties, &c. *ut supra*, but the chancellor will award costs as the case shall require. *Crompton's Chancery*, 45.

And in this section is also markable, (which I had almost forgotten), that the common law and the writs therein used, are patterns to all customs, and to their courts to follow; and so it is said statute laws are positive and the common law more ancient, and [read] of the exposition of the positive laws, *Plowd.* 363, *et seq.* 3 Co. 77b. *in fine*.

§ 77. And although that some such tenants have an inheritance according to the custom of the manor, yet they have but an estate but at the will of the lord, according to the course of the common law. For it is said, that if the lord do oust them, they have no other remedy but to sue to their lords by petition; for if they should have any other remedy, they should not be said to be tenants at will of the lord, according to the custom of the manor. But the lord cannot break the custom which is reasonable in these cases.

But Brian, Chief Justice, said, that his opinion hath always been, and ever shall be, that if such tenant by custom paying his services be ejected by the lord, he shall have an action of trespass against him. *III.* 21 E. 4. And so was the opinion of Danby, Chief Justice, in 7 E. 4. For he saith, that, tenant by the custom is as well inheritor to have his land according to the custom, as he which hath a freehold at the common law.

At the commencement, all copyhold interest was only *ad voluntatem domini*, as in this place appeareth, and in 9 Co. 76 *b*; and custom hath now fixed the estate so, as that in some manors such tenants have inheritance according to the custom of the manor; yet in judgment of law his estate is no other at this day; for although an estate have been anciently granted by words of inheritance by copy, yet such inheritance shall not have by the law any other collateral qualities, which do not concern the descent of the inheritance, which other inheritance at the common law [had]; and therefore such copyhold inheritance shall not be assets to charge [the] heir in an action of debt upon an obligation by his ancestors, although he do bind himself and his heirs; nor the wife of such a copyhold tenant shall not be endowed; nor the husband of a woman inheritrix shall not be of such estate tenant by the curtesy; nor a descent of such an estate of inheritance shall not take away the entry of him that hath a right unto it; *et sic de ceteris*.—4 Co. 22 *a*.

The heir cannot plead that his father was seised in fee at the will of the lord by copy of court roll of such a manor according to the custom of the manor, and that he died seised, and it descended unto him; for in truth such interest is but a particular interest at will in judgment of law, although it be descendible by custom. *Ibid. b*. And in regard of the baseness and weakness of the copyholder's interest in the judgment of law, he cannot levy a fine thereof, because he hath not a freehold; although by the form of the copy his interest is for life, in tail, or in fee simple. 3 Co. 77 *b*. Neither have such copyholders such manner of creations by livery and seisin, or by deed, as estates of frank-tenement at the common law have; also, tenants by copy shall not implead or be impleaded for such their tenements by the king's writs, (as in the precedent section doth appear); but they must sue by bill in the lord's court of the manor; and if there false judgment be given against the copyholder, he may not have a writ of false judgment upon it at the common law; for then he should be restored to the freehold, whereas he lost no freehold: *Kitchin*, 80 *b*: and his only remedy is to sue by bill, that is to say, by plaint in the lord's court. 7 *E.* 4. 19, or by *subpœna* in the Chancery; and for the same cause, that is, for the tenuity of his estate, a copyholder may not have an assize against his lord, as the tenants in ancient demesne may have. 4 Co. 21 *b*. 13 *R.* 2. [*Faux Judgment*, 7.]

And Littleton in this place saith, if the lord do put out his copyholder, he hath no remedy, but to sue unto his lord by petition;

and the same Littleton further saith, in 7 E. 4. 19, that he hath seen a *subpœna* brought by a copyholder against his lord, and it was holden by all the justices, that he shall recover nothing, because the entry of the lord was adjudged lawful, (*tamen, vide tit. Subpœna, 21, in Fitz.*) And Littleton saith, if he should have any other remedy he might not be said tenant at the will of the lord according to the custom of the manor; but he further saith and addeth, that the lord *ne voit enfreinder le custome que est reasonable en tiels cases*; but in some print the words are (*ne poet enfreinder*) and according to this letter the opinion of Danby, Chief Justice, was in the case before mentioned; for he saith, that the tenant by the custom is as well inheritable to have his land according to the custom, as he that hath freehold lands at the common law. And in 21 E. 4. 80, Brian, Chief Justice, said, that his opinion always hath been and ever shall be, that if such a tenant by the custom, paying his services, be put out by the lord, that he shall have an action of trespass against him. And in 4 Co. 21 a, it was adjudged by all the court, that the custom of the manor is the soul and life of the copyhold estates; for without custom, or if they do break custom they are subject to the will of the lord. But by custom a copyholder is as well inheritable to have his land according to the custom, as he who hath frank-tenement at the common law. Whereunto *Kitch. fo. 90 a*, if such a lord should be, who will break the custom, it is not reason to suffer him to be his own judge.

So we see the common law did respect such copyhold estates to be merely as tenants at will of the lord; but after long custom and continuance of time had fixed such estates, then the common law did take notice of them and of the said custom, reputing them to be more than tenants at will only, (*scil.*) to be tenants at will according to the custom, as in the beginning of this chapter is aforesaid; for uses, at the first invention and creation of them, were but trust and confidence between the parties, no ways issuing out of land, but collateral, annexed in privity of estate, and unto the persons touching the land; for he that had a use had *jus neque in re neque ad rem*, yet in long time those uses and confidences came to be reputed in some respects as chattels, and they were devisable, and in some respects they were reputed as hereditaments, of which there might be *possessio fratris*; though in judgment of law and truth before the statute 27 H. 8. cap. 10, they were neither chattels nor hereditaments; for they were not assets unto the executors nor unto the heir: 4 Co. 21 b, 22: *leges naturæ perfectissimæ [sunt] et immuta-*

*biles, humani vero juris conditio semper in infinitum decurrit, et nihil est in eo quod perpetuo stare possit. Leges humanæ nascuntur, vivunt, et moriuntur.* 7 Co. 25 a, in *Calvine's case*; et vide *Egerton's Book of Post-nati*, 47.

The distinguishing of the tenures of chivalry and socage was originally dividing the gentry from the yeomanry, but now it is not so. *Lambert's Estate of Kent*, 10. Escuage hath been a very ancient tenure in chivalry, but at this day that tenure is extinct. *Vide the Proclamation of the 2 Regis Jac.* Also, the ancient tenure by [escuage] near to the borders of Scotland, is, by the union of the kingdoms, utterly gone and extinct. *Tempora mutantur, nos mutamur in illis.*

### LIB. I. CAP. X.—TENANT BY THE VERGE.

§ 78. Tenants by the verge are in the same nature as tenants by copy of court roll. But the reason why they be called tenants by the verge is, for that when they will surrender their tenements into the hands of their lord to the use of another, they shall have a little rod (by the custom) in their hand, the which they shall deliver to the steward or to the bailiff according to the custom of the manor, and he which shall have the land shall take up the same land in court, and his taking shall be entered upon the roll, and the steward or bailiff according to the custom shall deliver to him that taketh the land the same rod, or another rod, in the name of seisin; and for this cause they are called tenants by the verge: but they have no other evidence but by copy of court roll.

§ 79. And also in divers lordships and manors there is this custom, viz. if such a tenant, which holdeth by custom, will alien his lands or tenements, he may surrender his tenements to the bailiff, or to the reeve, or to two honest men of the same lordship, to the use of him which shall have the land, to have in fee simple, fee tail, or for term of life, &c. And they shall present all this at the next court, and then he, which shall have the land by copy of court roll, shall have the same according to the intent of the surrender.

This chapter doth contain the effect of that doctrine, which in the precedent chapter is taught touching copyholds. The origina

inventory of this ceremony of the verge, used in surrenders and admittances, was to the end, that more certain notice might be given thereby of the transmutation of possessions from one to another; for certainty doth produce peace, but uncertainty contentions; and such apparent and overt ceremonies do better imprint remembrance of the thing done, because they are subject to view, than bare words which are only heard, and easily use to slip out of memory, like unto the first cause of the first invention of livery and seisin, in feoffments made of lands at the common law; whereof before, in the 59th section.

But he that doth surrender to the use of another by the verge, must not deliver the verge unto him to whose use the surrender is intended; but either into the lord's own hands, (if he be present,) or into the hands of the steward, or into the hands of the bailiff or reeve, and that in the presence of certain of the copyholders, more or fewer as the several customs do require; for the surrender must always be *in manus domini ad usum*, according to the intent of the surrender.

The lord also, or the bailiff unto whose hands the surrender is made, may not deliver the same, nor by the verge give him possession, to whose use the surrender was made; but must make presentment thereof to the lord in his next court, or in the next court afterwards to be holden, according as the custom is; and there and then, the steward of the lord in court or out of court, must deliver seisin and possession by delivery of the verge into the hands of him to whose use the surrender was made, or unto his attorney; for a man may take admittance unto a copyhold by his attorney: 9 Co. 75: for after surrender duly made, he to whose use the surrender is made, must, by himself, or by his lawful attorney, be thereunto admitted; and so the heir upon descent by the steward, for the reeve or bailiff cannot make admittance; for upon admittance the lord is to demand and have a fine, which till then he cannot have. 4 Co. 28. *Kitch.* 122a.

And therefore the custom almost in every manor is, after three several proclamations made in three several general courts, if the heir, or he to whose use the surrender was made, do not come in and take up the said lands according to the custom, that they shall be seised into the lord's hands as forfeited.

And it is to be noted, that this custom is to be understood, that it shall bind them who do not make claim, &c. if they be within the realm, or of full age, of sound memory, and out of prison; for no custom by the law may extend to bar those who in judgment of law

are not bound to make claim. 8 Co. 100 a, b. *Vide librum. Quære ibidem* of a femme coverte, because she hath a husband who might make claim; and in 4 Co. 27 a, it was resolved, if a femme, tenant for life take a husband, and the husband do commit waste against the custom of the manor, and dieth, the estate of the wife is utterly forfeited by the act of the husband.

But because *multa cadunt inter calicem supremaque labra*, it is good to consider what the law is; peradventure those tenants, into whose hands the surrender was made, will not make due presentment thereof in court accordingly; and it seemeth that this is perilous and peremptory for the purchaser, *ideo caveat emptor*; as in the case of bargain and sale of lands, which by the statute 27 H. 8. c. 16, must be enrolled within six months, if the officer do not his part and duty in that behalf, the purchaser is without remedy, for the land so intended to be assured unto him. 5 Co. 84 a. But in this case, if they, into whose hands the surrender was made, die before the next court, yet upon good proof of the very truth made of his surrender, it is good enough. 4 Co. 29 b. *Kitchin*, 86, and the same law is, although he, that did make the surrender, die, or he to whose use the surrender was made die before the presentment. *Co. ibid.*

*Nota*, it is a forfeiture in the copyholders, who took the surrender, if they do not thereof make due presentment according to the custom, if they have not a reasonable excuse; for they do as much as in them is to cause the lord to lose his fine, and also to disinherit the other party to whose use the surrender was made. *Kitch.* 58 a.

§ 80. And so it is to be understood, that in divers lordships, and in divers manors, there be many and divers customs in such cases, as to take tenements, and as to plead, and as to other things and customs to be done; and whatsoever is not against reason may well be admitted and allowed.

And so it is, to wit, that in divers seignories and divers manors are many divers customs; in such cases as unto the taking of tenements, and as unto pleading, and as unto other things, and the custom to do all that which is not against reason, may well be admitted and allowed. *See in Sir John Davies' R. fo. 30 a.* And concerning divers customs, as to the taking of copyhold lands, and what cus-

tom shall be adjudged reasonable, and what not; *vide Kitch.* 102 *a*, *et seq.* where among others this case is, if a man let to three for life, *habendum successivè*, this as a joint and successive lease, is void; but by the custom of copyholders, *successivè* doth hold place, and one shall have it after the other: 3 *H.* 8. *Bro. Estates*, 54: and according is the case in 9 *Co.* 104, and *Peryman's case*, in 5 *Co.* 84. *Consuetudo loci est semper observanda.* 4 *Co.* 21, 28.

Concerning the customs in pleading, they are also carefully to be observed, for good pleading *est lapis lilius*, the touchstone of the true sense and science both of common law and customs. 10 *Co.* 93 *b*. And the form of pleading is the most strongest proof. 8 *Co.* 35 *a*. It is commonly said *loquendum est ut vulgus*, but *sentendum, id est* pleading, *ut docti.* *Co.* 11 *b*, for the records of pleading entries and judgments are exquisite perfect, and do make equal and true distribution of all cases in question. *Ibid.* *fo.* 4 *a*.

When a copyholder doth derive his title from one who had estate to him and to his heirs, or *sibi et suis*; for those words by the custom of some manors do make a fee simple; *Kitchin*, 102 *b*; the usual pleading is to say that he was seised *in feodo simplici*; 3 *Co.* *fo.* 9 *a*; and not by the special words.

Every admittance of an heir to a copyhold upon a descent, doth amount in law to a grant, and so may be pleaded, and this hath been allowed for the avoiding of inconvenience, which else might ensue; for if a copyholder in such cases should be driven in pleading to shew the first grant, either it was before time of memory, and then it is not pleadable, or within time of memory, and then the custom doth fail; and for this cause the lord doth allow the copyholder in pleading to allege any admittance, as well upon a descent, as upon surrender, as a grant; and so he may allege the admittance of his ancestor as a grant, and shew the descent unto him, and that he did enter. But the heir cannot plead that his father was seised in fee at the will of the lord, by copy of court roll according to the custom of the manor, and that he did die seised, and that it is descended unto him; for in truth such an interest is but only a particular interest at will, in judgment of law, although it be descendable. 4 *Co.* 22 *b*.

When a copyholder doth claim common, or other profit, in the soil of a stranger, he must prescribe in the name of the lord of the manor, *viz.* to say that the lord of the manor and all his ancestors, and all those whose estate he hath, have had common in such a place for him and for his tenants at will: and this, because of the exility and baseness of his own estate; but when the copyholder doth claim



common or other profit in the soil of his lord, then he may not prescribe in the name of his lord; for the lord cannot prescribe to have common or other profit within his own soil; but in such cases forasmuch as he cannot prescribe in his own name, or in the name of his lord, he of necessity must allege, that within the manor is such a custom. And so note the difference between the pleading of prescription and custom. *Keilw.* 77 a. 4 Co. 31, 32.

Then he must allege the custom of the manor to be, *quod quilibet tenens customarius cujuslibet antiqui messuagii customarii, &c.* and not *quod quilibet inhabitans infra aliquod antiquum messuagium customarium*; for a copyholder hath customary interest in the house, and therefore he may have customary common in the waste of the lord. 6 Co. 60 b.

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§ 81. And these tenants which hold according to the custom of a lordship or manor, albeit they have an estate of inheritance according to the custom of the lordship or manor, yet because they have no freehold by the course of the common law, they are called tenants by base tenure.

And in the preclose of this section, the copyhold tenants are called tenants by base tenure, because of the baseness of that effect, because they have no estate of freehold or inheritance by the judgment of the common law; and this term which we now commonly call copy tenants or copyholders, or tenants by copy, is but a new term found out; for in ancient times they were called tenants in villenage, or of base tenure; and this may appear by the words of ancient copies, where such copyholders are named tenants in villenage, and in Latin *nativi tenentes*, and this term or word, namely, tenants by copy of court roll, is not mentioned or named. *Fitz. N. B.* 12 B.

And it is proved before in this section, that the freehold of all tenements by copy of court roll is in the lord, and not in the copyholder; and upon this reason, among others, it is resolved, that the king shall not have the custody of the land which doth descend to an idiot, notwithstanding the words of the statute made 17 E. 2. *Prerogativa Regis.* 4 Co. 126 b.

§ 82. And there are divers diversities between tenant at will, which is in by lease of his lessor by the course of the common law, and

tenant according to the custom of the manor in form aforesaid. For tenant at will according to the custom may have an estate of inheritance (as is aforesaid) at the will of the lord, according to the custom and usage of the manor. But if a man hath lands or tenements, which be not within such a manor or lordship where such a custom hath been used in form aforesaid, and will let such lands or tenements to another, to have and to hold to him and to his heirs at the will of the lessor, these words (to the heirs of the lessee) are void. For in this case if the lessee dieth, and his heir enter, the lessor shall have a good action of trespass against him; but not so against the heir of tenant by the custom in any case, &c. for that the custom of the manor in some case may aid him to bar his lord in an action of trespass, &c.

As the common law doth distinguish between the copyholder's interest by custom, created by the law, as well concerning the freehold, as the inheritance, (as before appeareth), so in this place Littleton [noteth] the manifold diversities, when a lease at will is made by the assent of the parties at the common law, and when a copyhold interest is made by custom of the manor, which is upon the matter but an estate at will according to the custom; and the example put doth explain it; for tenant at will according to the custom may have an inheritance descendable; but if a man without custom do let lands to have and to hold to him and to his heirs of the lessee, at the will of the lessor, there passeth but a lease at will merely, not descendable, and the words "his heirs," are void in that case, except livery and seisin be made, although the intent of the parties do appear otherwise; for Anderson, Chief Justice of the Common Pleas, saith, "Judges must know the intent of the parties by sensible words, which are agreeable and consonant unto the rules of the law." 1 Co. 85 a. 104 a. 8 Ass. pl. 33, *Voucher. Note, Baldwin's case*, 2 Co. 23.

But if the heir of a copyhold estate of inheritance enter after the death of his ancestor, before the lord hath admitted him, yet the lord may not against him have an action of trespass, although his ancestors had estate but at will, according to the common law; for the custom will serve to bar the lord from an action of trespass.—*Keilw.* 76. And the heir of a copyholder may by his entry before admittance, make *possessio fratris*, or make surrender, and take

the profits; and if he die before admittance, it shall in like sort descend to his heir. *Kitchin, Customs*, 102 a. 4 *Co.* 23 b.

§ 83. Also, the one tenant by the custom in some places ought to repair and uphold his houses, and the other tenant at will ought not.

§ 84. Also, the one tenant by the custom shall do fealty, and the other not. And many other diversities there be between them.

In some manors the custom is, that the tenants by copy must maintain and do all reparations in their houses and tenements; in some seignories the custom is otherwise, for they may pull them down if they will, or suffer them utterly to decay, and shall not be impeached by the lord for the same, neither is it any forfeiture; as the custom is so in the manors of Hackney and Stebunheath; and what is intended by the law by this word "reparations" you may read before in the seventh chapter. 2 *H.* 4. 13. 43 *E.* 3. 32.

But the lord shall have the timber trees growing upon the copyhold lands, and may sell them, except the custom be, that the tenant ought to have them, as is aforesaid; and yet nevertheless though the lord do take away the trees, yet the copyholder must do reparations at his peril, and at his charges, and may not hinder the lord in that case from felling or from selling his own trees, although thereby some prejudice be to the copyholder, as is aforesaid; and for want of shadow for his cattle, or for the acorns that may grow upon the said trees. *Vide* 11 *Co.* 48 a, b.

But so long as there is timber growing, there the copyholder may have as much benefit by custom, as tenant at will may by the common law in like case; he may cut down trees to repair his house and also to take housebote, haybote, and ploughbote. *Kitch.* 102.

Also, tenant by copy shall do fealty unto his lord, because his estate is certain, and of continuance, according to the custom; but tenant at will, by the order of the common law shall not be compelled to do fealty, because of the uncertainty of his interest and exility of his estate (1).

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(1) See *Co. Lit.* 63 a.—*Ed.*

LIB. II. CAP. I.—*HOMAGE*.

## SECT. 85.

**H**OMAGE is the most honorable service and most humble service of reverence, that a frank-tenant may do to his lord. For when the tenant shall make homage to his lord, he shall be ungirt, and his head uncovered, and his lord shall sit, and the tenant shall kneel before him on both his knees, and hold his hands jointly together between the hands of his lord, and shall say thus: "I become your man from this day forward, of life and limb, and of earthly worship, and unto you shall be true and faithful, and bear to you faith for the tenements that I claim to hold of you, saving the faith that I owe unto our sovereign lord the king;" and then the lord so sitting shall kiss him.

In the first book are declared the divers estates men have in lands and tenements; and in this second book are shewed the divers services by which lands and tenements are holden; for insomuch as all lands in the hands of any subject of this realm are holden from one lord or other, (as from whom the tenements at first were given), it is requisite that the tenants should do unto their lords some manner of service; for if the tenant nor his heirs should not do some manner of service unto the lord and to his heirs, then by continuance of time it would be out of memory and remembrance, whether the said lands were held of the said lord and of his heirs or not; and then more oft and more readily would men say, that the lands are not held of the lord and of his heirs, than otherwise, and thereby the lord should lose the escheat of his land, or other forfeiture, or profits, which he should have of the lands; therefore it is reason that the lord and his heirs have some service made unto them, to prove and testify that the lands are holden of them as followeth, sect. 130 et 138. *Sir John Davies' R. 37 a.*

But this honorable and humble service of reverence, homage, I have read was brought into England out of France, where it had its original, and before Hugh Capet was king there, this word was not heard of; and long use and custom hath made homage to be reserved as a part of the common law, and it is called *homagium feodale*, because it is due *ratione feodi, sive tenuræ*. 7 Co. 7.

The form and manner of doing fealty and homage is thus, by Bracton, li. 2. fo. 80, which book he made in the reign of King Henry the Third:—*Debet quidem tenens manus suas utrasque ponere inter manus utrasque domini sui, per quod significatur ex parte domini protectio, defensio, et warrantia, et ex parte tenentis reverentia, et subjectio, et debet dicere hæc verba, &c.*

And by parliament, in the 17th year E. 2, when a freeman shall do homage to his lord, of whom he holdeth in chief, he shall hold his hands together between [the] hands of his lord, and shall thus say, “I become your man from this day forth for life, for member, and for worldly-honor, and shall owe unto you for the lands which I hold of you, saving the faith that I owe to our sovereign the king, and to my other lords.”

But in the form here prescribed are divers other more particulars, namely, 1. that the tenant shall be ungirt; 2. his head uncovered; 3. his lord shall sit and his tenant shall kneel upon both his knees; which observations, though they may be intended to be done, and so ought of right to be performed to any sovereign king by his subjects, yet wherefore it should be a general rule for all tenants, and for all lords of seignories indistinctly, *quære*; for experience sheweth that oftentimes persons of mean quality have gotten the seignories of many manors, lands, and tenements, the tenancies whereof are in the hands of some right honorable and noble personage; but peradventure it shall be said, and answered, that the intention of the law originally was not so, and that the possessions in the hands of the nobles at the first were such only of the king, by grand serjeanty, or *in capite*, or otherwise of the king. *Vide Lambert's Perambulation, 9. Ubi lex non distinguit nos nec distinguere debemus.* 7 Co. fo. 5 b.

And amongst the other solemnities and ceremonies in making homage this also Littleton doth add, that the lord sitting is to kiss his tenant, whereof Bracton doth make no mention, nor the statute 17 E. 2, yet custom hath brought it in, and approved it, as a bond of law, most ancient; as for example, of Laban's kissing of Jacob. So also in the Evangelist, St. Luke, cap. vii. v. 45, “Thou gavest

me no kiss, but she, from the time I came to her, ceased not to kiss my feet :” and a sufficient analogy is ’twixt this kind and the holy kiss of charity in the primitive church ; and in the story of Thomas of Canterbury under H. 2. ( as elsewhere ) occurreth the receiving of him *in osculo pacis*. *Selden’s Titles of Honor*, 43 ( 1 ).

The last clause in this section is likewise mentioned in Bracton, *ubi supra*, *salva fide debita domino regi et hæredibus suis*, which is but abundance, but well done for explanation : *quod tacitè intelligitur, decesse non videtur* ; 4 Co. 22 a ; and *in captione homagii semper subintelligendum erit quod hoc sit salvo jure cujuslibet*. Bracton, 78 a.

§ 86. But if an abbot, or a prior, or other man of religion, shall do homage to his lord, he shall not say, “ I become your man, &c.” for that he hath professed himself to be only the man of God. But he shall say thus : “ I do homage unto you, and to you I shall be true and faithful, and faith to you shall bear for the tenements which I hold of you, saving the faith which I do owe unto our lord the king.”

§ 87. Also, if a woman sole shall do homage, she shall not say, “ I become your woman ;” for it is not fitting that a woman should say, that she will become a woman to any man, but to her husband, when she is married. But she shall say, “ I do to you homage, and to you shall be faithful and true, and faith to you shall bear for the tenements I hold of you, saving the faith I owe to our sovereign lord the king.”

Now in these sections<sup>\*</sup> is taught the fashion and manner how an abbè or prior shall do and make his homage to his lord for the lands which they hold of the lord. Note, that the law doth never allow any thing to be done that is *indecorum*, or which is done *contra bonas mores*. 10 Co. 73. According to this reason see

(1) Ego I.B. Rex Scotorum me hominem vestrum de toto regno Scotia: et omnibus pertinentibus et his quæ ad hoc spectant, quod regnum meum teneo, et de jure tenere clamo de vobis et hæredibus ves-

tris, hæreditario, regibus Angliæ et de vita, de membris, et terreno honore contra omnes homines qui putant vivere et mori. Vide Tho. Walsingham, in E. 1. page 54.—Note in MS.

section 202, and upon the same reason is the next section, and 9 Co. 49 a, and 4 Co. 73 a.

§ 88. Also, a man may see a good note in Mich. 15 E. 3. where a man and his wife did homage and fealty in the common place, which is written in this form. Note, "that I. Lewkner and Eliz. his wife did homage to W. Thorpe in this manner: the one and the other held their hands jointly between the hands of W. T.," and the husband saith in this form: 'We do to you homage, and faith to you shall bear, for the tenements which we hold of A. your consor, who hath granted to you our services in B. and C. and other towns, &c. against all nations, saving the faith which we owe to our lord the king, and to his heirs, and to our other lords,' and both the one and the other kissed him. And after they did fealty, and both of them hold their hands upon the book, and the husband said the words, and both kissed the book."

This is not in the book at large of other reports of cases in that year, but it is in *Fitz. Abr. tit. Avowry*, 109; and Littleton's opinion was, as it seemeth, that if a femme covert have a tenancy holden by homage in fee, or fee tail, jointly with her husband, before issue had between them, they ought to join in the making of homage in fealty; for in 7 E. 4. 28, it was ruled, *si baron purchase ters le feme ne ferra homage tanq il ad issue et donq il sole ferra homage; mes si baron et feme purchasent jointment ters tenus per homage ambidexter ferront homage*; and if the husband have a seignory in the right of his wife, he cannot receive homage of the tenant without his wife. *Avowry*, 103, *Fitz. 2 E. 2.* and *F. N. B.*, 257 f, doth recite the rule in the Register, fo. 206 a, that a feme sole may make homage and fealty, and shall pay relief, when she sues her livery, and if she be covert *de baron*, if they have issue, when they sue livery, then the husband shall do homage and fealty, but if they have no issue, then the husband only shall now do homage: *Videtur Ibidem*, saith Brooke, *tit. Fealty & Homage*, 16. yet the homage is lost for a time, for a feme covert cannot do it with her husband, for he is in not yet in case to [be] tenant by the curtesy; and in 44 E. 3. 4. it was admitted, that the lord cannot avow upon

the husband and wife seised *in jure uxoris* for homage, unless the husband have issue by the wife. *Vide* 44 E. 3. 13. And it is here said, that this homage was made in the common place, and not in the country, which indeed may be done, where the lord doth bring a writ of customs and services against his tenant. 7 E. 3. 28.

In this case no mention is made, that the woman in doing her homage should be ungirt or uncovered, for it is uncomely for a woman so to do, as we read in *St. Paul's* [First] *Epistle to the Corinthians*, cap. xi.

Also, it is here to be observed, that the husband only must pronounce the words accustomed; for silence becometh a woman in the presence of her husband, although in the contract of matrimony she also must openly speak in the congregation, by the ecclesiastical law. It becometh not a woman to speak in the congregation, *Corinthians*, 1. cap. xiv. verse 34.

Homage being in due form made, then the tenant must also do fealty, *id est*, he must make to his lord *sacramentum fidelitatis*; for homage doth draw with it fealty as inseparable, as escuage doth draw with it knight's service tenures. And in this case where homage is to be made by the husband and his wife, they both must also join in the oath of fealty, and in taking of solemn oaths nothing ought to be feigned, but ought to be *ex fide non fictâ*. 7 Co. 40 b; for although the husband and his wife are but one person in law, yet, as the text saith, *sunt animæ duæ in carne uno* (4 Co. 118 b.) the manner of doing whereof is also in this place declared, viz. the one and the other shall hold their hands upon a book, that is to say, their right hands, the book must be the Evangelists, or some part of the Old or New Testament, though it be not here expressed.

And this is called a corporal oath, because by such outward gesture and act it is testified, not verbally only; and that this ceremony used in giving and taking the corporal oath, with laying hands upon the book, and swearing by the contents thereof are not unlawful, read *Dr. Cosins' Apology*, 3 part, cap. 4. This form of an oath to be *tactis Evangelistis*, first invented by Justinian, as I read by Barloe, bishop of Lincoln, in answer to a nameless catholic. By the common law when a bishop is to take a solemn oath, the book is to be laid open before him, but he need not lay his hand upon the book or kiss it (*Fox's Book of Martyrs*) and the words of the statute 17 E. 2. are, "When a villain shall do fealty, he must hold his right hand over the book." The Jews, when they take a solemn oath, have the books of Moses held in their arms, by the



name of the God of Israel which is merciful, they swear with formal addition of words, which they used, as Christians upon the Evangelist. *Selden*, 329, in his *Titles of Honor*.

§ 89. Note, if a man hath several tenancies, which he holdeth of several lords, that is to say, every tenancy by homage; then when he doth homage to one of his lords, he shall say, in the end of his homage done, "Saving the faith which I owe to our lord the king, and to my other lords."

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It is usual, in the end of doing homage, to say, "Saving the faith which I owe to our sovereign lord the king, and to my other lords," if he have other lands also holden of other lords by homage; but such saving is not necessary, for the cause before alleged in the end of sect. 85.

§ 90. Note, none shall do homage but such as have an estate in fee simple, or fee tail, in his own right, or in the right of another. For it is a maxim in law, that he which hath an estate but for term of life, shall neither do homage or take homage. For if a woman hath lands or tenements in fee simple, or in fee tail, which she holdeth of her lord by homage, and taketh husband and have issue, then the husband in the life of the wife shall do homage, because he hath title to have the tenements by curtesy of England if he surviveth his wife, and also he holdeth in right of his wife. But if the wife dies before homage done by the husband in the life of his wife, and the husband holdeth himself in, as tenant by the curtesy, then he shall not do homage to his lord, because he then hath an estate but for term of life.

More shall be said of homage in the tenure of homage ancestrel.

Note this maxim, that he that hath estate but for term of life, as tenant in dower by the curtesy, or after possibility of issue extinct, shall not do homage, or take homage, but such who have

estate of inheritance in his own right, or in the right of another; and the example here put is to be well observed, for it doth well declare Littleton's meaning concerning that case formerly put, sect. 88.

And observe in the end of this section, that the estate which the husband hath in this case, during the life of his wife, is a fee simple *in jure uxoris*; but after the death of his wife that greater is devolved unto an estate but *pro termino vitæ suæ*, by the operation of law. *Vide* 9 Co. 139.

## LIB. II. CAP. II.—FEALTY.

§ 91. Fealty is the same that *fidelitas* is in Latin. And when a freeholder doth fealty to his lord, he shall hold his right hand upon a book, and shall say thus: "Know ye this, my lord, that I shall be faithful and true unto you, and faith to you shall bear for the lands which I claim to hold of you, and that I shall lawfully do to you the customs and services which I ought to do, at the terms assigned, so help me God, and his saints;" and he shall kiss the book. But he shall not kneel when he maketh his fealty, nor shall make such humble reverence as is aforesaid in homage.

As *feodum* hath its root in *fides*, howsoever by different writing thence varied, and from it is our word *field*, which was anciently *feud*, or *feuld*: *Selden*, 302; so fealty, which is done for such lands, *idem est, quod fidelitas*, in Latin; and although homage be the most humble service of reverence, that any free man can do to his landlord, yet fealty is a more sacred service than homage, for fealty is made upon oath, and so is not homage. 4 Co. 8 b. and there also it is resolved, that the only seisin of fealty is good seisin of all the service, by which the tenant doth hold his land; and the reason is, because of this oath made in form, as in the book appeareth.

§ 92. And there is great diversity between the doing of fealty and of homage; for homage cannot be done to any but to the lord

himself; but the steward of the lord's court, or bailiff, may take fealty for the lord.

And great diversity there is between making of fealty and of homage; for homage is personal, and cannot be made but only unto the lord himself, because of the so great reverence therein used, and by reason of the reciprocal covenant which is thereby intended between the lord and his tenant; but the steward of his court or bailiff may take fealty for the lord. But no other person may do fealty (scil.) *facere sacramentum fidelitatis*, but the tenant; for oaths taken and made ought to be *ex fide non ficta*, as before is said, sect. 88; and see 9 Co. 76 a.

And it seemeth the law was, that homage was to be done to the person of the king. *Rot. Parliament*, 18 H. 6. artic. 58, in a great plague being about London, a petition was made up in Parliament desiring the king, for his own preservation, to ordain and grant authority of this parliament, that every and each of your said lieges may in doing their homage, omit the kissing of you. See more at large in *John Selden, Titles of Honor*, 43. But at this day the king may respite the taking of homage, *Fitz. N. B.* 169; or if the king's pleasure is that his tenants do their homage, it doth appertain to the lord chamberlain of England to receive it, for the king. *Fitz. N. B.* 256 f. *Stamf. Prerog. cap.* 25.

Fealty due unto two coparceners, lords, may be done to one, and good, and shall excuse him against the other. 3 E. 2. 18. 7. *Avowry, Fitz.* But if homage be due to three coparceners, it must be made unto them all in common, and therefore it is a good plea, where one of them demandeth it, to say, he is ready to make it to them all in common. 12 E. 3. *Avowry*, 236. *Vide librum.*

§ 93. Also, tenant for term of life shall do fealty, and yet he shall not do homage. And divers other diversities there be between homage and fealty.

One other diversity is here also set down, viz. tenant for life shall do fealty, that is, unto his lessor, though no rent be reserved; but he shall not do homage, neither to his lessor, nor to the lord of

whom those lands are holden, for the rule is before (sect. 90) that tenant for life shall neither do homage, nor take homage; but the reason wherefore tenant for life shall do fealty to his lessor, is, because he holdeth the lands of him, and this is proved by the words in the writ of waste; when the lessor hath cause to bring a writ of waste against him, the writ shall say, that the lessee doth hold the tenements of the lessor for term of life, and so the writ doth prove a tenure between them, sect. 132; where also it is said, that lessee for years shall do fealty unto his lessor.

§ 94(1). Also, a man may see in 15 E. 3. how a man and his wife shall do homage and fealty in the common place, which is written before in the tenure of homage.

More shall be said of fealty in the tenure in socage, and in frank-almoign, and in the tenure by homage ancestrel.

## LIB. II. CAP. III.—*ESCUAGE*.

§ 95. Escuage is called in Latin *scutagium*, that is, service of the shield; and that tenant, which holdeth his land by escuage, holdeth by knight's service. And also it is commonly said, that some hold by the service of one knight's fee, and some by the half of a knight's fee. And it is said, that when the king makes a voyage royal into Scotland to subdue the Scots, then he, which holdeth by the service of one knight's fee, ought to be with the king forty days, well and conveniently arrayed for the war. And he, which holdeth his land by the moiety of a knight's fee, ought to be with the king twenty days; and he which holdeth his land by the

(1) It should be observed, that in the Harleian MS. the 94th and 95th sections of Littleton are put together at the beginning of the following Chapter on Escuage: the mistake has probably arisen from the error of the transcriber of that MS. In none of the old editions of Littleton is

the 94th section omitted: this observation is made, because, were that the case, the first section of the next chapter might have been divided into two, (though in truth not consistently with Littleton's logical divisions) and so the error accounted for.—*Ed.*

fourth part of a knight's fee, ought to be with the king ten days; and so he that hath more, more, and he that hath less, less.

Tenure by escuage taketh this name of the Latin word *scutagium*, (scil.) *servitium scuti*, which is in English a target, a necessary part of the furniture of a soldier, or knight in wars; and because escuage is martial, and to be done in wars by the person of a man, therefore such a tenant who holdeth by escuage, holdeth by knight's service.

And it is here said, that some do hold by a whole knight's fee, and some a moiety or lesser part of a knight's fee: and sect. 113, it is said, that a man may hold his land of his lord by the service of two knights' fees, (or more) but doth not express what a knight's fee is, therefore it is to be known, that a knight is properly to be esteemed according to the quality, that is, by the content of the lands of that tenure, and *census militaris*, the estate of a knight is measured by the value of 20*l. per annum*, and not by any certain content of acres (1). 9 Co. 124 a.

The original, when this tenure by escuage was instituted, is not here mentioned; but Saunders, Justice, in *Plowden*, 126 b, and Brooke, Chief Justice, 129 b, saith, that escuage was invented after Wales did come in subjection to the kings of England, and was under their regiment and obedience, against whom war was made by the kings of England as against rebels, and not against enemies. *Vide sect. 155.* But see the notes upon Hengham, fo. 123, that in ancient time escuage was not restrained to wars against the Welsh and Scots only, as by latter authority it seems to be, as in Littleton. *Fitz. N. B. fo. 83 C. Regis. Orig. 88 a. 19 R. 2. tit. Guard. 165. Plowd. 129.* At this day the tenure by escuage concerning Scotland is expired, by the union of both the kingdoms in King James, as by the proclamation, the second year of King James, may appear, intituled, A Proclamation concerning the King's Majesty, still King of Great Britain; nevertheless the student must not neglect the observations in this chapter of Escuage, nor in those of Frank-almoign, or of Villenage, for by the reason of those cases the student shall the better understand other cases newly happening, or which he shall read in books; for, as Wray, Chief Justice, and Sir Thomas Gawdy, say in 3 Co. fo. 23 a, as he that is a bastard

(1) See Co. Lit. 69 a.—Ed.

born hath not a cousin, so every case doth carry with it suspicion of his legitimation, unless there be another case, which shall be as his cousin german, to support and to prove it. And as this tenure is extinct for Scotland, so it is also extinct for Wales.

Tenant by escuage was bound by his tenure to perform his service due in those countries before mentioned, only when the king went against them on a voyage royal with an army royal; and in the next section it is remembered, that Sir William Herle, Chief Justice of the Common Place, said, Escuage shall not be granted but where the king doth go himself in proper person; but a voyage royal is by other books thus described, viz. where the king doth go in wars, &c. of his lieutenant, or the deputy of his lieutenant, or the protector, who is [*pro-*] *rex*. 7 Co. 8 a. 3 H. 6. *Protection, in Fitz., et Fitz. N. B.* 28, fo. 83 C.

It followeth also in this place, that he who holdeth by a whole knight's fee, ought to be with the king by forty days, and so according to the rate, who more, [more], who less, less. *Nota*, that the [term] of forty days, hath in our law divers applications. *Vide Poliobion*, 270.

But in ancient time, all taxes, levies, and rates, laid upon the subject, were by the hides or carenes of land, but since the conquest, the course hath been, to make the taxes according to the quality of the tenure, and not by the quantity of the land. *Exposition of the Terms of the Law, Hydc*; and *Dr. Cowell's Interpreter, verbo Hydc*. And see *Magna Charta*, cap. 2. for relief; and *Westminster 1.* cap. 34. and 25 E. 3. cap. 12. concerning the levying of reasonable aid, and by this manner of imposition, it is very probable, that this penalty of escuage was devised and imposed after the conquest.

It seemeth that the law is, that the tenant by escuage, during the time of his residence in the wars, because of his tenure, is to bear his own charge, but after the time expired, he is not compellable to serve without wages. *Vide statute 1 E. 3. cap. 7.* 18 E. 3. cap. 8. 7 Co. 7 b. that the opinion of Thirninge [7 H. 4. tit.] *Protection*, 100, is to be understood, that no subject is to be compelled to go out of the realm without wages.

It is also in this place said, that the tenant [by] escuage must be, during the time of his service according to the proportion of his tenure, well and conveniently arrayed for the wars. But whether his furniture must be as a horseman, or foot, is not declared; and it seemeth that for so much as his tenure is by knight's

service, it is requisite that in doing that service he be furnished as a knight, that is, on horseback.

Bracton, fo. 35, & 75 *b*, maketh mention of *rod-knight*, that is to say, serving horsemen, who held their lands with condition, that they should serve their lords on horseback, and the name of *eques auratus*, or knight, hath its original in all places from a horse (the most usual beast of the war.) See *Selden's Titles of Honor*, 332. *Camden*, 171 *b*.

The proper furniture of a knight, as supposed incident to knight-hood, consisted in horse and arms, and as by our common laws the *equitatura*, which is the horse that any man keeps for his journeying, is privileged from the return of issues, (as clothes and household stuff and beasts of the plough from execution of debt) *Westm. 2. cap. 38, 39. Regis. Orig. fo. 100 b.* so anciently were a knight's horses of martial equipage, and that although he had been indebted to the king. *Selden*, 321, *his Titles of Honor*.

§ 96. But it appeareth by the pleas and arguments made in a plea upon a writ of detinue of a writing obligatory brought by one H. Gray, Tr. 7 E. 3. that it is not needful for him which holdeth by escuage, to go himself with the king, if he will find another able person for him conveniently arrayed for the war to go with the king. And this seemeth to be good reason. For it may be, that he which holdeth by such services is languishing, so as he can neither go nor ride. And also an abbot, or other man of religion, or a feme sole, which hold by such services, ought not in such case to go in proper person. And Sir William Herle, then Chief Justice of the common place, said in this plea, that escuage shall not be granted but where the king goes himself in his proper person. And it was demurred in judgment in the same plea, whether the forty days should be accounted from the first day of the muster of the king's host made by the commons and by the commandment of the king, or from the day that the king first entered into Scotland. Therefore inquire of this.

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This case alleged is Trin. 7 E. 3. 29. fo. 246 *a*, and is also in 9 Co. 49 *b*, where he doth add another reason hereof, namely, the

great regard which the law hath unto the dignity of knighthood, in cases where his service is to be done by reason of his tenure of land. But ordinary soldiers who are hired and retained by press-money or wages, have not this privilege.

How, and from what time, the computation of the forty days shall be made upon the attendance of him who holdeth by escuage, is not resolved by the one book or by the other, but it seemeth to me that the computation is to be made from the day in which the king doth enter first into Scotland, and not from the first muster, by the king's command, of his army royal in England, for that is but to prefer, and words *accipienda sunt cum effectu*, 4 Co. 51 b; so, unless such construction be made, peradventure all the days of his attendance, or most of them, shall be expired, between the muster and the king's entry into Scotland; and the nature of the tenure by escuage is, for service to be done against the Scots in England.

§ 97. And after such a voyage royal into Scotland, it is commonly said, that by authority of parliament, the escuage shall be assessed and put in certain; *scil.* a certain sum of money, how much every one, which holdeth by a whole knight's fee, who was neither by himself, nor by any other, with the king, shall pay to his lord of whom he holds his land by escuage. As put the case, that it was ordained by the authority of the parliament, that every one, which holdeth by a whole knight's fee, who was not with the king, shall pay to his lord forty shillings; then he which holdeth by the moiety of a knight's fee, shall pay to his lord but twenty shillings; and he which holdeth by the fourth part of a knight's fee, shall pay but ten shillings; and he which hath more, more, and which less, less.

§ 98. And some hold by the custom, that if escuage be assessed by authority of parliament at any sum of money, that they shall pay but the moiety of that sum, and some but the fourth part of that sum. But because the escuage that they should pay is uncertain, for that it is not certain how the parliament will assess the escuage they hold by knight's service. But otherwise it is of escuage certain, of which shall be spoken in the tenure of socage.

By authority of parliament this penalty of escuage shall be assessed, and put in certainty (*scil.*) into certain sum of money, how



much every man shall pay unto their lords, of whom they do hold their lands by escuage; for the lords may not be judges to give judgment and sentence, and parties also to have the penalty, *quia aliquis non debet esse iudex in propria causa, imo iniquum est aliquem suæ rei esse iudicem.* 8 Co. 118 a. So it appeareth that this escuage, which is intended to be knight's service, must be escuage uncertain, that is, the certain sum of money or penalty, which the tenant shall pay to his lord for his absence and default, is not known till by parliament it be assessed (as before is said); for escuage certain is socage tenure, as shall be said in the chapter of Socage.

And therefore, if any do hold lands by custom or by tenure, and if the escuage be assessed by parliament to any sum of money, they shall pay but the half of it, or the fourth part of it, yet this tenure is by knight's service; but otherwise it is if the tenure be, that after the parliament hath assessed what every tenant shall pay for his absence, that nevertheless he shall pay to his lord 20s. or other certain sum, this tenure is socage.

Lastly it is here taught, that if custom be one way in the negative, and an act of parliament being afterwards made generally in the affirmative, as for example, that all such tenants, by a whole knight's fee holden in escuage, shall pay a certain rate, which is another way, this statute law shall not abrogate the custom, although sometimes *leges posteriores priores contrarias abrogant.* 1 Co. 25 b.

But a statute in the affirmative doth not take away a former law or custom, especially if the former be particular, and the latter general. 6 Co. 19 b. See a good case in 33 H. 8. 50. *Dyer. et 5 Co. 5 b. in casu Eccl.*

§ 99. And if one speak generally of escuage, it shall be intended by the common speech, of escuage uncertain, which is knight's service. And such escuage draweth to it homage, and homage draweth to it fealty; for fealty is incident to every manner of service, unless it be to the tenure in frank-almoign, as shall be said afterwards in the tenure of frank-almoign. And so he which holdeth by escuage, holds by homage, fealty, and escuage.

Lastly, in this place from what time a custom begins, *vide sect. 170.* 3 Co. 9 a.

Escuage is either certain or uncertain (as before is shewed): uncertain *est servitium militare*, and certain *est servitium socæ, quia quemadmodum certitudo scutagii facit socagium, ita incertitudo facit servitium militare*; and if a man speak generally of escuage, it shall be understood *secundum excellentiam*, in common speech, the most excellent service, and that is knight's service (for the defence of the realm), and not *de servitio socæ*; for the rule is *quod verba æquivoca et in dubio posita, intelliguntur in digniori et potentiori sensu*. And more examples here in 6 Co. 20, in Gregory's case, and in 11 Co. 38 b, 39 a, and in Litt. Sect. 10. and Sect. 293.

The words also are, that escuage doth draw to it homage; but it is to be understood where the tenant hath estate of inheritance, for tenant for term of life cannot do homage (as before is said); and in that case tenant for life shall pay escuage, but shall not do homage. *Bro. Terms*, 68 and 87. *Fitz. N. B. F.*

By that is taught in this section, the student must diligently observe, that some things are part of other things, though known by their several proper names; as houses and trees, mills and such like, which are growing and fixed to the land, and are parcel of the land; and therefore by a grant of all his lands, all his houses, mills, and woods do pass, *appellatione fundi omne ædificium et omnis ager continetur*; 4 Co. 87 b. and [that] which is parcel or incident to another thing, passeth by grant of the thing, without making any mention thereof. *Vide Stamf. Prerog.* 44 a. A court baron is incident to a manor, and a court of piepowder unto a fair. *Bro. 19 H. 8. tit. Incidents*, 34, and *Perkins*, 22; and they are inseparably annexed, as fealty doth follow homage in this section.

*Est corona regis [facere] justitiam et judicium, et tenere pacem, et sine quibus corona consistere [non] potest, nec tenere: hujusmodi autem jura sive juris-dictiones ad personas vel tenementa transferri non poterunt, nec a privatâ personâ possideri nec usus nec executio juris, nisi hoc datum fuerit ei de super, sicut juris-dictio delegata non [delegari] poterit, quin ordinaria remaneat cum ipso rege.* *Bracton*, li. 2. cap. 24. fo. 55.

If the king do grant his crown, or any part thereof, it is a void grant, and therefore all those grants in former times made of *jura regalia*, as that they might make *justiciarios suos ad pacem*, or to make denizens, or to pardon felonies, were void in law, 20 H. 7. 8; for these things are inseparable incidents. But things that do only concern the profits or revenues of the king, although they do greatly ennoble the crown, yet by special words they may be severed from

the same, being accounted rather ornaments than necessary incidents, and inseparable; for if the king have a mine of gold in his own lands, or in the soil of another, his majesty may grant or give it away by apt words. *Plowd.* 336. *Vide Stamf. Prerog.* 42 b.

Some incidents are not so inseparable but that they may be severed, as rent is incident to the reversion, yet it may by grant be severed.

Some things are said to be appendant or appurtenant, and are not incident, as advowsons and villanies regardant, and commons. *Vide* 4 Co. 37, *Tyringham's case*.

§ 100. And it is to be understood, that when escuage is so assessed by authority of parliament, every lord, of whom the land is holden by escuage, shall have the escuage so assessed by parliament; because it is intended by the law, that at the beginning such tenements were given by the lords to the tenants to hold by such services, to defend their lords as well as the king, and to put in quiet their lords and the king from the Scots aforesaid.

In this place is shewed, that this penalty, after it is assessed by parliament, shall be paid as well to other lords, as to the king; and he draweth this proof and argument from the original cause of the tenure, for before the statute *quia emptores terrarum*, which was made 18 E. 1, it was lawful for any man to reserve a tenure to himself, and those reasons which are drawn from the original causes are *vivificæ rationes*, and proofs are *viscera causæ, et expositio, quæ ex visceribus causæ nascitur, est aptissima in lege*, 8 Co. 16 a. 10 Co. 24 b; and therefore, *qui respicit se ad principia, is perspicit artium causas ac certam et firmam notitiam habet, quæ neque falli ullo modo potest. Stamford Lectori before his Pleas of the Crown: felix qui potuit rerum cognoscere causas.*

If a tenant hold of two several lords by a whole knight's fee, or other part, by escuage, and in a voyage royal doth go in the wars with one of his lords, this shall not excuse him, if he do not also find another able man, conveniently arrayed, to attend his other lord; for he is bound by his tenure to defend as well the one lord as the other, and the service which he hath done unto one lord is no performance of the service which he ought to do unto the other

lord; but it is to be observed that the tenant by escuage is not capable to go into those wars, but only for to defend his lord; *ergo* if his lord do not find one for him, or otherwise do agree or compound with the king, for the voyage, the tenant shall be excused. *Fitz. N. B.* 83 II.

.§ 101. And because such tenements came first from the lords, it is reason that they should have the escuage of their tenants. And the lords in such case may distrain for the escuage so assessed, or they in some cases may have the king's writs directed to the sheriffs of the same counties, &c. to levy such escuage for them, as it appeareth by the register. But of such tenants as hold of the king by escuage, which were not with the king in Scotland, the king himself shall have the escuage.

The remedies which are by law appointed for the lord, are two, as in this place is shewed, viz. by distress, or by writ *de scutagio habendo*, which are referred to; see in the Register; thereof also note *Fitz. N. B.* fo. 83 G; and here, by the way, the reader must know, that the Register which containeth the original writs of the common law is the ancientest book of the law, 10 Co. Pref. fo. 8; also is observable the judicious opinion of Fitz. in his preface to his Nat. Brev. where he saith, that original writs are the foundations whereupon the law dependeth, and how truly he calleth them the principles of the law; and fortifieth also the opinion of Bracton, lib. 5. fo. 413, where he saith, that *breve formatum est ad similitudinem regulæ juris*, 8 Co. Pref. 5 b; and with this agreeable, see in *Plowd.* 77 a, and 228, and *Ibid.* 125, Saunders, Justice, termeth the register or claim.

Then let us put the case further, viz. the lord is within the wars, but tenant makes default, and escuage is assessed by parliament, and before it be levied the lord alieneth his seignory, it seemeth that now this escuage is lost and irrecoverable by the grantor, or by the grantee, as in the case of the relief; put the case also as before, and that afterwards the lord dieth, the question is, whether this escuage due shall be to the heir or the executor of the lord; and it seemeth the executor shall have it, because it is no part of the inheritance, but a penalty for not doing that real service like to relief, which is but an impediment to the service, and therefore in both

these cases the remedy for the executor is by action of debt. [4 Co.] *Ognell's case*, 49. *Keilway*, 133. *Sect.* 740.

§ 102. Item, in such case aforesaid, where the king maketh a voyage royal into Scotland, and the escuage is assessed by parliament, if the lord distrain his tenant, that holdeth of him by service of a whole knight's fee, for the escuage so assessed, &c. and the tenant pleadeth, and will aver that he was with the king in Scotland, &c. by forty days, and the lord will aver the contrary, it is said, that it shall be tried by the certificate of the marshal of the king's host in writing under his seal, which shall be sent to the justices.

In this last section is shewed the means which the tenant by escuage hath for his exoneration and discharge, if the lord do distrain him, and the tenant do plead, and will aver that he hath performed his service due, according to (1) the which is by certificate of the marshal of the king's host, in writing under his seal, which shall be sent unto the justices; but in *Fitz. N. B.* 83, the certificate must be from the constable (2) of the king's host; and so is the *Register*, 88; and originally they were two distinct offices, but in the administration of justice, both were of equal authority (*vide Camden*). Selden, in his *Titles of Honor*, 210, saith, that from the old use of this word *mars* or *mare* you must derive marshal; (scil.) *marc scalc* literally is as much as *equi* or *equorum præfectus*, that is, master of the horse, which without question is the true etymology of the great office of marshal, joined anciently in England with the constable (scil.) *comes stabuli*, in their judicial place of court of chivalry (3).

And note, this certificate duly come to the justices, makes an end of the matter, for it is not traversable, 2 *E.* 4. 1. 7 *Co.* 14 *b*; because it is a trial in our law, whereof there be twenty several

(1) There appears to be some inaccuracy in this passage: I have not ventured to make any alteration, as the MS. is too clear to be mistaken, and the books do not enable me to propose any emendation with confidence.—*Ed.*

(2) In the earliest edition of Littleton's *Tenures*, by *Letton and Machlinia*, the word "constable" is used instead of "marshal."—*Ed.*

(3) See *Co. Lit.* 74 *a.*—*Ed.*

manners of trial. *See the Lord Chancellor's Speech, fo. 82 b. [in the case of the Post-nati] 9 Co. 30. See the notes upon Fortesc. 21.*

It is also in this place said, that the certificate must be made under the seal of the marshal, which was brought in by the conqueror; for thus writeth Ingulphus, Abbot of Croyland, who is said to have come in with William the Conqueror; *ante Normannorum ingressum cirographa firma erunt cum crucibus aureis, aliisque signaculis, sed Normannos cum cereâ impressione uniuscujusque speciale sigillum sub intitulatione trium vel quatuor testium conficere cirographa instituere.* 3 Co. Pref. fo. 5. *Nota Selden, 324, in his Titles of Honor.*

#### LIB. II. CAP. IV.—KNIGHT'S SERVICE.

§ 103. Tenure by homage, fealty, and escuage, is to hold by knight's service, and it draweth to it ward, marriage, and relief. For when such tenant dieth, and his heir male be within the age of twenty-one years, the lord shall have the land holden of him until the age of the heir of twenty-one years; the which is called full age, because such heir, by intendment of the law, is not able to do such knight's service before his age of twenty-one years. And also, if such heir be not married at the time of the death of his ancestor, then the lord shall have the wardship and marriage of him. But if such tenant dieth, his heir female being of the age of fourteen years or more, then the lord shall not have the wardship of the land, nor of the body; because that a woman of such age may have a husband able to do knight's service. But if such heir female be within the age of fourteen years, and unmarried at the time of the death of her ancestor, the lord shall have the wardship of the land holden of him until the age of such heir female of sixteen years; for it is given by the statute of Westm. 1. cap. 22. that by the space of two years next ensuing the said fourteen years, the lord may tender convenable marriage without disparagement to such heir female. And if the lord within the said two years do not tender such marriage, &c. then she at the end of the said two years may enter, and put out her lord. But if such heir female be married within

the age of fourteen years in the life of her ancestor, and her ancestor dieth, she being within the age of fourteen years, the lord shall have only the wardship of the land until the end of the fourteen years of age of such heir female, and then her husband and she may enter into the land, and oust the lord. For this is out of the case of the said statute, insomuch as the lord cannot tender marriage to her which is married, &c. For before the said statute of Westm. 1. such issue female, which was within the age of fourteen years at the time of the death of her ancestor, and after she had accomplished the age of fourteen years, without any tender of marriage by the lord unto her, such heir female might have entered into the land and ousted the lord, as appeareth by the rehearsal and words of the said statute; so as the said statute was made (as it seemeth) in such case altogether for the advantage of lords. But yet this is always intended by the words of the same statute, that the lord shall not have these two years after the fourteen years, as is aforesaid, but where such heir female is within the age of fourteen years, and unmarried at the time of the death of her ancestor.

Knight's service is service touching war to be made by the body of a man, which is to be performed either out of the realm, as in Scotland, &c. as before appeareth of escuage uncertain; within the realm of England, as where the tenure is by castle guard; *sect.* 111; or by cornage; *sect.* 156; or by grand serjeanty, which for the greatest part is to be done within the realm.

In England, before the Conquest, there were military feuds, though not in like manner as since; *vide Selden*, 300, in his *Titles of Honor*, and so the law of King Canute doth prove it; and there earls and thanes were bound to a kind of knight's service, *ibid.*; and according, both of this tenure by knight's service, and of the other [by] socage, *see in 3 Co. Pref. fo. 3a.*

But the custom of wardships in chivalry came into England with the Norman Conqueror, and they begun not under Henry 3. as most ignorantly Ranulph Higden, the monk of Chester, and Polidore, saith. *Selden*, in his *Book of Honor*, 302, and the notes upon *Fortescue*, fo. 51.

Littleton here saith, when such a tenant by knight's service dieth, his heir male being within age, the lord shall have the land holden of him *quousque* twenty-one; so that it appeareth that no wardship shall be where there is not an heir, either general or special, for wardship must be of lands of some ancestor, who hath an heir; and the words of the writ of *diem clausit extremum* and *mandamus* are, *et quis propinquior hæres ejus sit*; and *nota* the consequence hereof. *Digby's case*, in 8 Co. 165 b.

And the reason and cause, wherefore the lord hath also the marriage of his ward, is, *ne tenentes capitales ejus inimicis nubent, et de inimico suo vel alio modo minus idoneo personâ homagium de feodo suo cogatur dominus recipere*. • *Gldnville*, li. 2. cap. 12. (See this book, for it is upon the marriage of the heir female in the life of the ancestor).

And what Justice Fortescue hath written in approbation of this law, concerning the training up of orphans and young gentlemen infants, to arms; read the 44th cap. of his book, and the notes thereupon, *fo*. 51.

The prescript time by the law appointed, when the orphan or heir male shall be out of ward, [is] at his age of twenty-one years, and before that his full age, he, by intendment of law, is not able to do such knight's service.

And therefore this law hath given the custody and wardship of the land, during his minority, to the end that, with the profits thereof, he might bring up his ward male in matters of chivalry, and therewith find an able man in the mean time, if need require, to perform that service

But though the intendment of the law be, that the heir within the age of twenty-one years is not able to do knight's service, yet such a presumption of law doth give place to judgment and proof to the contrary, as it is said, *stabitur presumptioni donec probetur in contrarium*; and therefore when the king, who is the sovereign and supreme judge of chivalry, hath dubbed him a knight, he by this hath adjudged him able to do knight's service, and all men are concluded to say the contrary; 6 Co. 73 b. *Sir Drew Drury's case*; and there it was also resolved, that when the king doth make the heir apparent within age of a tenant by knight's service, a knight, in the life of his ancestor, and after the ancestor dieth, the said heir within age, in this [case] he shall be out of wardship, and shall pay no value for his marriage, nor the lord shall have the custody of the body. *See* 8 Co. 171.



According as it appeareth in this case, that all men are concluded to say contrary to the judgment and decree of the king, in dubbing an infant within age a knight; so if the king do create a *fême covert* to be a marquis, or of any other degree of nobility, although her husband be but a knight, or of less degree, she is a marquis according to the king's judgment, notwithstanding that saying of Mountague's, Chief Justice, and Hale's, Justice, in *Dyer*, 79*b*, that by the law of God she is *sub potestate viri*; and that her name of dignity shall be changed according to the degree of her husband, notwithstanding the curtesy of the ladies of honor, and court (1).

Also, in this place it is to be observed, that the heir may be married by his ancestor before his death; so saith *Strange*, in 7 *H. 7. fo. 12a.* as good title hath the ancestor to the marriage of his son, as hath the lord after his death; and when he is married by him according to the law, the law will not compel him to have another wife, *et qui per legem facit non debet puniri.*

You see the diversity put by Littleton, between the age of an heir male, and the age of an heir female, as touching wardship.

But by the opinion of some others, the ancient common law was, that the wardship of female heirs did continue till twenty-one years, as of males, and that age was only *plenaria ætas*. See *Dr. Cowell's Inst. li. 1. tit. 15. (5).*

And the alteration was into that it now is for common persons, by the statute made 3 E. 1. called Westminster 1. cap. 22. and for the king by the statute made 39 H. 6. cap. the last. *Selden's Titles of Honor, pt. 1. fo. 54.*

§ 104. Note, that the full age of male and female, according to common speech, is said the age of twenty-one years. And the age of discretion is called the age of fourteen years: for at this age, the infant which is married within such age to a woman, may agree or disagree to such marriage.

(1) The rule of *femina nobilis si nupserit ignobili desinitur esse nobilis*, is to be understood, where she gaineth her honor by her marriage, which is by a convenience in law; but where she gets her honor by her marriage from the king, by his donation, she is out of the rule. I have heard

that Sir John Walter hath a report and resolution of all the judges in England, that the king, by the rules of the common law, cannot confer honor on the wife without the consent of the husband; about 30 *Eliz.*—Note in *MS.*

This case doth shew that the full age of male or female, according to common speech, and to all purposes, is in both at twenty-one years; but the age of discretion is the age of fourteen years in the male, and of females twelve years, as you may see 47 E. 3. *Bract. li. 2. fo. 86b.* saith, *quod fœmina magis est capax doli masculis, et quod maturiora sunt vota mulieris quam viri.*

§ 105. And if the guardian in chivalry doth once marry the ward within his age of fourteen years to a woman, and if afterward at his age of fourteen years he disagree to the marriage, it is said by some, that the infant is not tied by the law to be again married by his guardian, for that the guardian had once the marriage of him, and because he was once out of his ward as to the ward of his body. And when he had once the marriage of him, and he was once out of his wardship, he shall no more have the marriage of him.

§ 106. In the same manner it is, if the guardian marry him, and the wife die, the infant being within the age of fourteen years or twenty-one.

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The lord doth marry his ward within the age of consent, who after doth disagree to it, although the law now saith, there was no marriage *ab initio*; and though by a second marriage in that case the heir shall not be bigamied, 6 Co. 22; yet the lord shall not marry his ward again, 5 Co. 102; and this is to be understood as well in the case of the ward *infra annos nobiles*, *Fitz. N. B.* 143; the reason and cause thereof is, because this imperfect marriage of the ward was the act of the lord or guardian himself, and *volenti non fit injuria*: and so is the law if the guardian do marry his ward, and after they be divorced, *causâ præcontractus*, yet he shall not have the marriage of him again. 27 H. 6. tit. *Guard.* 118.

But if the ancestor do marry his heir *infra annos nobiles*, and die, and afterwards that marriage is dissolved by disagreement, at their several ages of consent, or by death, before the said age, in that case the lord shall have the marriage of such heir; but if the heir be married in the life of the ancestor, when they both be of their several ages of consent, though afterwards the said marriage is dissolved by the death of one of them, before such time as the

heir is out of wardship for his land, in this case the lord shall not have the marriage again of such heir: *vide* 6 Co. 22 b; and so note the diversity. But if the king do marry a female, whom he hath in ward, *infra annos nubiles*, and before the age of consent the husband dieth, the king shall have the marriage of the heir again, because the first marriage was not complete. *Vide accordut* 6 Co. 22. et 9. 132.

§ 107. And that such infant may disagree to such marriage, when he comes to the age of fourteen years, it is proved by the words of the statute of Merton, cap. 6. which saith thus :

*De dominis qui maritaverint illos quos habent in custodiâ suâ, villanis, vel aliis, sicut burgensibus, ubi disparagentur, si talis hæres fuerit infra quatuordecim annos, et talis ætatis quòd matrimonio consentire non possit, tunc si parentes illi conquerantur, dominus amittat custodiâ illam usque ad ætatem hæredis, et omne commodum quod inde receptum fuerit, convertatur ad commodum hæredis infra ætatem existentis, secundum dispositionem parentum, propter dedecus ei impositum. Si autem fuerit quatuordecim ans et ultra, quòd consentire possit et tali matrimonio consenserit, nulla sequatur pœna.*

And so it is proved by the same statute, that there is no disparagement, but where he which is in ward is married within the age of fourteen years.

Littleton having before spoken of the male heir in ward, and of his age to consent or disagree to matrimony, to be at his age of fourteen years, he doth also in this section proceed to prove that point by the express words of the statute made at Merton, which was in the 20th year of H. 3. cap. 6. which, in some books, is referred to the 7th cap. the words are, *De dominis qui maritaverint illos quos habet in custodiâ suâ, villanis, &c. si talis hæres fuerit infra quatuordecim annos, et talis ætatis quòd non possit consentire matrimonio*, and doth conclude with this penalty or forfeiture, *tunc si parentes illi conquerantur, dominus illius amittat custodiâ, &c.* which proof, being grounded on an act of parliament, is the chiefest proof for the point.

And concerning the disparagement in this statute of Merton mentioned, this word *villanus* is a poor servile townsman, and in this statute differing from *burgensis*, only as *villa* from *burgus*, not as our law now useth it, for service or a slave. *Selden, in his Titles of Honor*, 268. 334. And whereas it is reputed a disparagement for a ward in chivalry, which in old time was as much as to say, a gentleman to be married to the daughter of one that dwelt in a borough, and supposed it ought to be restrained to such only as used handicrafts, or those baser arts of buying and selling to get their living by, and not, by merchandize; for navigation is the only laudable part of all buying and selling; and in ancient times the Saxons admitted to the state of gentry, such only as increased by honest husbandry, and plentiful merchandize, of the first of which Cicero affirmeth, that there is nothing meeter for a free born man, and of the other, that it is praiseworthy also if at the length being satisfied with gain, as it hath often come from the sea to the haven, so it changes from the haven into lands and possessions. Note of all these matters in *Lambert's Perambulation of Kent*, 368.—*See the notes upon Hengham, fo. 121.*

§ 108. Note, it hath been a question how these words shall be understood (*Si parentes conquerantur*). And it seemeth to some, who considering the statute of *Magna Charta* which willeth, *quod hæredes, maritentur absque disparagatione*, &c. upon which this statute of Merton upon this point is founded, that no action can be brought upon this statute, insomuch as it was never seen or heard, that any action was brought upon the statute of Merton for this disparagement against the guardian for the matter aforesaid, &c.; and if any action might have been brought for this matter, it shall be intended that at some time it would have been put in use. And note that these words shall be understood thus, *Si parentes conquerantur, id est, si parentes inter eos lamententur*, which is as much as to say as if the cousins of such an infant have cause to make lamentation or complaint amongst themselves, for the shame done to their cousin so disparaged, which in manner is a shame to them, then may the next cousin, to whom the inheritance cannot descend, enter and oust the guardian in chivalry. And if he will not, another cousin of the

infant may do this, and take the issue and profits to the use of the infant, and of this to render an account to the infant, when he comes to his full age. Or otherwise the infant within age may enter himself, and oust the guardian, &c. *Sed quære de hoc.*

After this law of wardship and marriage was brought in by William the conqueror, as is aforesaid, in process of time, the lords intending their own profits and pleasures, did often neglect the prosperity of their wards, and in this principally, by marrying them unto persons disparaged; and therefore, in the 6th cap. of *Magna Charta*, which was made in *anno* 9 H. 3. it was enacted, *hæredes autem maritentur absque disparagatione*; but because thereby no penalty was imposed, therefore this statute was made at Merton, in the 20th year of the same king, *si parentes conquerantur de illo domino dominus ille amittat custodiam usque ad ætatem hæredis, et omne commodum quod inde præscriptum fuerit, convertatur ad commodum ipsius hæredis, qui infra ætatem est, secundum dispositionem et provisionem parentum suorum propter dedecus ei factum.* (*Quæritur, ut crescant tot magna volumina legis? In promptu causa est, crescit in orbe dolus.*) 3 Co. 82. And though it be in this section said, that no action can be taken upon this statute of Merton, because it hath not been heard or seen at any time, that any action hath been brought thereupon, for such disparagement; for if an action might be brought for this matter, it shall be intended that at some time it should have been put in use, and herein doth agree Justice Glanville, in 1 Co. 87 b. *vide sect. 733.* Yet the lord thereby, because of such disparaged marriage, shall lose his wardship by the entry of the next cousin, or by the entry of the ward himself; for so are the express words of the statute, and there is reason that so it should be; for whereas in truth all the estate of the ancestor, and the establishment of his inheritance, together with the comfort of his cousins, doth principally consist in providing of a convenient marriage for the heir apparent; therefore the law doth give them remedy against the lord, who, of his own wrong, doth deprive him or them, by such disparagement, of the means to accomplish it. *Vide 3 Co. 38 b.*

But in this matter there is an exception by intendment, which is as full in the exposition of both the afore-recited statutes, as if it had been expressed in words, and that is, that the king is excepted;

for it is usual that the makers of acts of parliament of restraint, wherein they mean to bind the king, do name him expressly, and if he be not expressly named, the intent of the makers hath always been taken by the expositors of the statute to be, to bind subjects, and to extend unto them only, and not unto the king; for he is favored in all expositions, and because it is no statute without the king's assent, it is intendable, when the king doth assent, he did not mean to prejudice himself, or to restrain himself of his liberty, but that he did assent that it should be a law between his subjects, *vide Plowd.* 240; unless it be in some special cases, which see, in *5 Co. 2d part*, 14*b*; but *nota*, the retainer of the land *quousque* is not given, when the wardship of the body, and the marriage, is severed from the wardship of the land. *Dyer*, 260. 306*b*.

In this section also, occasion is given to the student to observe the construction of the law, concerning this word *parentes*, which here is declared to extend to all the cousins of the infant; and not only to the father or mother, and as well to those in the descendant line, as in the ascendant; and in the statute of Merton, cap. 17, the words are, *provisum est insuper quod si terra quæ tenetur in socagio sit in custodiâ parentum*, (which in the English book is translated, "in the keeping of his friends,") but the civilians call all ascendants upwards, till you come to the great-grandfather, (*parentes*) and those above they term (*majores*), and the descendants of like degree are named (*posteriores*); but in our law the word "ancestor," doth comprehend as well the father and mother, as all degrees upwards. See Britton, in the chapter of assises turned into juries, where you shall see this word "ancestor" for father, viz. *p que ill est notorius que vous ne fuit ingen de cest auncestor*, &c. in the beginning of this chapter, see the word "ancestor;" and in statute 25 E. 3. stat. 2, *de natis ultra mare*, you shall find the word "ancestor," and the word "*enfants*," which in the English book is translated "children;" and how our law doth understand that word; *vide 6 Co. 17 et 76*: the word *puer*, in the statute of Merton, cap. 6, in the English book is translated "child," and Westm. 1. cap. 35, the word *liberi* by the civilians is sometimes for immediate children, and sometimes shorter and sometimes longer. The last thing which is to be observed in this place is this, viz. that the next *amy* of the heir may enter upon the lands of the ward, according as the order of the law is in case the heir's lands were in the tenure of socage, (*which see sect. 123*,) because of such disparaged marriage, and all the issues and profits

by them taken, shall be to the use of the infant, (for so are the words of the statute of Merton aforesaid); but it seemeth the opinion of Littleton was, that they are not by the law to be compelled to make account thereof unto the infant, before he do come to his full age; *quare hoc*; for by such delay prejudice may grow unto the ward, for if such a receiver die, no action of account will be maintainable against his executor, as it followeth; *sect. 125*. But if the ward within age in that case may enter by the law and put out his guardian in chivalry, then it seemeth reasonable, that the heir at such time as the law doth adjudge him to have his lands, that at any time after he may have an account, for the having his lands out of the hands of his guardian is the principal; and therefore *à fortiori* he shall have an account of the issues and profits, which are but personal; but of this point the author maketh a *quare*; and *vide* his *sect. 123, in fine*.

§109. Also, there be many and divers other disparagements, which are not specified in the same statute. As if the heir which is in ward, be married to one which hath but one foot, or but one hand, or which is deformed, decrepid, or having some horrible disease, or great and continual infirmity; and (if he be an heir male) if he be married to a woman past the age of child-bearing. And there be other causes of disparagement; but inquire of them, for it is a good matter to understand.

It appeareth by that which hath been spoken, that the statute in Magna Charta, cap. 6, did only by general words prohibit all disparaged marriages, but what was a disparagement is not there specified, but left *tacite* unto the determination of the Judges, as unto the expositors of the true meaning of the makers of the statute. *Vide Egerton's Post-nati, 54. Cuilibet in sua arte perito est credendum. 5 Co. part 1. 7 a. 4 Co. 29 a. and in sect. 48, hic: et nota in 7 Co. fo. 19 a.* And although the other statute of Merton afterwards doth name some disparagements, yet those few are put there but for example, and not to declare all the disparagements which the law intendeth, but doth refer the further consideration of them also unto the reverend Justices, as the like in the penning and constraining of the statute made 27 H. 8. cap. 10, for the jointure

of women, and of the statute of Westm. 2. cap. 1, of tailed lands. *Vide 4 Co. fo. 2. Plowd. 252 a, 53 b*, and therefore Littleton concludeth well, many other cases of disparagement there are, *sed de illis quære*; for it is a good matter to learn and inquire after.

§. 110. And of heirs males which be within the age of twenty-one years after the decease of their ancestor and not married, in this case the lord shall have the marriage of such heir, and he shall have time and space to tender to him convenable marriage without disparagement within the said time of twenty-one years. And it is to be understood, that the heir in this case may chuse whether he will be married or no; but if the lord, which is called guardian in chivalry, tenders to such heir convenable marriage within the age of twenty-one years without disparagement, and the heir refuseth this, and doth not marry himself within the said age, then the guardian shall have the value of the marriage of such heir male. But if such heir marrieth himself within the age of twenty-one years, against the will of the guardian in chivalry, then the guardian shall have the double value of the marriage by force of the statute of Merton aforesaid, as in the same statute is more fully at large comprised.

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The author, purporting to speak of the statute of Merton, cap. 6, concerning the forfeiture of marriage, beginneth this section thus; *Et des heires males qui sont deins l'age, &c.*, whereby he sheweth his opinion, that the said statute was made only against heirs males, and not against heirs females; and so it is resolved in 6 Co. 71, and in his 9th part, 72, which also is plainly proved by the words in the said statute, and that the lord cannot have the forfeiture or double value against an heir female, neither by this statute of Merton, nor by the statute of Westm. 1. cap. 22, nor by any law or statute at this day.

It is manifest by the statute of Merton here mentioned, that the lord cannot have the penalty and double value against his male ward but after a lawful tender of marriage made by him unto the infant, and also after his taking of another wife, before he be of age to be out of ward; and that the woman, so to be tendered to the heir, must be without disparagement, appeareth before; and this tender



must be personal, by shewing unto him the person of the woman. 40 E. 3. 6 b. 5 Co. 58; and for the doing [this], the lord shall have time and space until the infant do come to his full age of twenty-one years, as appeareth; but if the infant do prevent his lord, and marry himself after his age of consent, so that it is vain for the lord now to tender him marriage, and it is said, *lex neminem cogit ad vana seu inutilia peragenda, quia inutilis labor stultus*; 5 Co. 21 and 29; yet the lord, to have the double value, is to tender to the infant another marriage after; for conformity in this case is a kind of necessity. *Finch, lib. 3. fo. 9 b.*

But in this special case, viz. if the lord do recover the value of the marriage, against the ravisher of the heir, and after he do tender unto the heir marriage, and he do refuse, and marry himself to another within age, yet the lord shall not have the double value against the heir, because he hath recovered already against the ravisher. *Bro. Forfeiture de Marriage, 13. Old N. B. in the end of the Writ de Ejectione Custodiæ.*

At the common law there was no forfeiture, but at the common law [lay] not only the writ *de valore maritagii*, but also *quare se intrusit maritagio non satisfacto*. 5 Co. 127. 31 Ass. pl. 26.

Also, by this statute, *dominus retineat terram ejus ultra terminum viginti unum annorum per tantum tempus quod inde possit percipere duplicem valorem maritagii, &c.* so that by the express words the profits shall be accounted parcel of the double value; but in case of the single value, the words of the statute are, *det domino et satisfaciat ei, &c. pro maritagio suo, antequam terram suam recipiat*, by which words it appeareth, that the lord shall receive the profits to his own use, till the heir do satisfy him. 4 Co. 82. 27 H. 8. 5 b. 31 Ass. pl. 26. 43 E. 3. 21.

And therefore the lord shall not have a writ for the single, nor for the double value, but upon an abatement of the heir, or else in case where he hath the wardship of his body, and not of his land; for where he hath the land there he may retain, &c. *Bro. tit. Forfeiture of Marriage, 13. N. B. in fine de Ejectione Custodiæ.*

The queen reserveth the custody of the lands, and granteth out the marriage of the heir, the grantee doth make a tender, and the heir refuseth, and at his full age sueth his livery; the grantee prayeth that he may have the lands to his use, until the heir hath paid his marriage, he would have it as a distress and gage, Dyer and Saunders, assistants, deemed to grant it; the same law is in the case of a common guardian in chivalry. 9 El. 260, pl. 23.

But the single marriage, that is to say, *valor maritagii de mero jure pertinet ad dominum feodi*, as in the end of this seventh chapter doth appear; for at the common law, before the making of this statute, the guardian might in action of trespass recover it in damages, and the guardian might by the common law hold the land of such an heir male *nomine pænæ*, till the value had been paid; and therefore, although no tender be made, the guardian may at his election retain the lands, or bring his writ *de valore maritagii*.—6 Co. 71. 5 Co. 127. *Keilw.* 126.

Also, upon the statute Westm. 2. cap. 22, if the guardian do not tender a man to his female ward during those two years, he shall not recover *valorem maritagii*, by the express words of the statute. *Ibid.* Dr. Cowell's *Inst.* li. 1, *de Nuptiis*, tit. 10. § 4, saith, *neque tamen matrimonia usque adeo sunt libera apud nos, &c.* for by Hul's Bachalarius, *utriusque juris*, in 7 H. 6. 11 a. *compulsio est duplex, præcisa et causativa, &c.*, as in this case.

§ 111. Also, divers tenants hold of their lords by knight's service, and yet they hold not by escuage, neither shall they pay escuage; as they which hold of their lords by castle-ward, that is to say, to ward a tower of the castle of their lord, or a door, or some other place, of the castle, upon reasonable warning, when their lords hear that the enemies will come, or are come in England. And in many other cases a man may hold by knight's service, and yet he holdeth not by escuage, nor shall pay escuage, as shall be said in the tenure by grand serjeanty. But in all cases where a man holds by knight's service, this service draweth to the lord, ward and marriage.

All matters mentioned in this section, are, before at large in the beginning of this chapter, section 103.

§ 112. And if a tenant which holdeth of his lord by the service of a whole knight's fee, dieth, his heir then being of full age, (*scil.*) of twenty-one years, then the lord shall have 100s. for a relief, and of the heir of him which holds by the moiety of a knight's fee, 50s.

and of him which holds by the fourth part of a knight's fee, 25s. and so he which holds more, more, and which less, less.

§ 113. Also, a man may hold his land of his lord by the service of two knights' fees; and then the heir, being of full age at the time of the death of his ancestor, shall pay to his lord 10% for relief.

As wardship and marriage are incident to knight's service, in case where the heir is within age at the time of the death of the ancestor, so relief is due to the lord when the heir is of full age at the death of his ancestor.

But in case where the lord hath had, or might take his benefit by the wardship or marriage of the heir, there no relief is payable by the express words of Magna Charta, cap. 3. *Postquam talis hæres fuerit in custodiâ cum ad ætatem pervenerit (scil.) viginti unius anni habeat hæreditatem suam sine relevio et sine fine.*

Relief is no part of the service, but a fruit and approvement of the service, and as a blossom or fruit fallen from the tree. 3 Co. 66 a; and therefore if a man do enfeof another to hold of him by fealty and 12d. for all services and demands, yet he shall have relief, because relief is no service of itself, but an improvement, which issueth from the service. *Relief, Fitz. 13.* A man did hold of another by knight's service, and died, his heir being of full age, the question is, if the lord may have an action of debt for the relief or not; and it was argued, that no, because it is parcel of the seignory, and of the same nature that the rent is, although it be not annual, and is not a thing incident unto a seignory, as waif, stray, or such like; and although for escuage a man might have an action of debt, yet it is not unto this case, because escuage is assessed by parliament, and is a thing that is made a duty by parliament, but relief is not given by the statute of Magna Charta, cap. 2, and this is proved by the words of the statute, which are *secundum antiquam consuetudinem prius usitatam*, so nothing is given by the statute, but it is an affirmance of the common law: but *Keble* was of a contrary opinion, and his reason was, because this relief is but a cognizance or acknowledgment after the death of the ancestor to be made unto the lord, and is not of the same nature that the rent is; for a man cannot have a *præcipe* for a relief, as it is not annual, but a casualty, which peradventure the lord shall not have during his life, and also the statute of Magna Charta hath made the relief certain, so it is in a manner as a thing adjudged, and therefore the action of debt doth lie well. *Keilw. 133.*

But distress is the ordinary remedy in this case, and the land is chargeable therewith, in whose hands soever it cometh after the relief is due; the acceptance of the rent or service by the hands of the feoffee, do not bar the lord of his relief due before, nor the acceptance of homage, or any other service of the heir, do not bar the lord of his relief. *Ibid.*

And so relief needeth no avowry to be made upon any person certain; for if relief were part of the service, no action of debt might lie for it, so long as the rent hath continuance; but that an action of debt will lie for relief, it is proved by this book, and many others. *Dyer, 24 a. 32 H. 8. rot. 429. 20 H. 7. per Brian*; but this is to be understood, that the executors of the lord may have an action of debt in this case, but the lord himself must distrain, and shall not have an action of debt. *4 Co. 49 b.*

Note also, in this case relief is not payable but by the heir in by descent, and not by any purchaser; for if the father seised in fee did enfeof his son and heir of full age, and dieth, he shall pay no relief, for this case is out of the statute of Marlebridge, cap. 6, *de his qui primogenitos feoffari solent infra etatem*, *Stamf. Prerog. 9. cap. 1*, and is not to be taken by equity to extend to this case.—*17 [27] E. 3. 63.* But note, this is remedied by *32 et 34 [H. 8. of] Wills. 3 Co. 66 a. Debet releivum*, saith Bracton, *qui succedit jure hæreditario, non autem qui acquirit. Ibid. [Lib. 2. c. 36. fo. 84.] Vide Keilw. 136 b.*

And *quære*, if the heir female in such case be fourteen years old at the time of the death of her ancestor, whether she must then pay relief, or not till she be of the age of twenty-one years, or suppose she do marry a man of full age.

But there hath been great question in our books, when the heir within age holdeth part of his lands of the king, and other parts of other lords by knight's service, in which case the king shall only have the wardship of the body, and of all the lands by his prerogative, whether those other lords should lose their reliefs and rents, because their seignories were suspended, or what remedy those others have against the heir, when he is of full age, and out of the wardship of the king, or to sue to the king by petition. *Stamf. Prerog. cap. 1, in fine. Bracton, li. 2. fo. 82 a. 26 H. 8. 2. 4 E. 3. 8 et 24. 13 H. 7. 15 a*, and the heir shall pay relief in this case.

And long before the Conquest every feud or fief paid relief or heriot upon death of the tenant, and the heir or successor came in

always, as at this day, in some fashion of a new purchase; and [relief] is more ancient than wardship and marriage. *Selden*, 302, in his *Titles of Honor*.

Bracton, in the chapter first before mentioned, giveth a reason of this word relief, *quia hæreditas quæ jacens fuit per antecessoris decessum, relevatur in manus hæredum, et propter talem relevationem facienda erit ab hærede quædam præstatio quæ dicitur relevium. Vide Dr. Cowell's Interp. verbo, Relief.*

Relief or heriots in ancient time before the Conquest were paid by the heir to his lord in such things as were for martial furniture, as horses, spears, shields, money, and the like. *Selden*, 225 and 300. But in this place is shewed the rule and certainty what this relief shall be, viz. according to the quantity of the tenure by knight's service, for it is so declared by *Magna Charta*, cap. 2, *hæres vel hæredes militis de feodo militis integro habeat hæreditatem per centum solidos ad plus, et qui minus habuerit, minus det, secundum antiquam consuetudinem feodorum*; and there is also shewed what is the relief for an earldom or barony, and by that a man may collect what value or yearly revenue the law required to be for the support of every degree of honor in the commonwealth, for always the fourth part of the revenue was payable for relief, 7 Co. 33 b, and more at large in 9 Co. 124, and in *Selden*, fo. 232.

§ 114. Note, if there be 'grand-father, father, and son, and the mother dieth, living the father of the son, and after the grand-father, which holds his land by knight's service, dieth seised, and his land descend to the son of the mother as heir to the grandfather, who is within age; in this case the lord shall have the wardship of the land, but not of the body of the heir, because none shall be in ward of his body to any lord, living his father, for the father during his life shall have the marriage of his heir apparent, and not the lord. Otherwise it is, where the father dieth living the mother, where the land holden in chivalry descends to the son on the part of the father, &c.

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By this case is shewed a prerogative, which by the law is given unto the father during his life, in the body of his child, and a certain privilege unto the child in regard of his father; and this maxim of the common law is framed according to the law of nature, whereof see at large, example in *Plowd.* 304 b. but in this case the same

privilege is not unto the mother (1), and unto the child in regard of the mother, and the cause of this diversity is *propter excellentiam*, when God had divided reasonable creatures into two sexes, viz. male and female, *mas est præstantior, deterior fœmina*; also men for the greater part are more reasonable than women, and to all government and directions men are more apt than women are, *mas ad principatum potior est naturâ quam fœmina*, all these sentences gathered out of Aristotle are found and read in our law books. *Plowd.* 305.

But this privilege, in this section mentioned, is only in regard of the heir apparent to the father; for if the case be, that a man by his first wife have issue a son, and she dieth, and he taketh another wife, and by her also hath issue another son, that wife also dieth, and lands holden by knight's service or *in capite* descend unto the issue of the second wife, from the ancestor of the part of his mother, he shall be in ward, if he be within age, although his father be living. 31 *E. 1. Guard.* 154. *Fitz.*

Or if the father be attainted of felony or treason, in this case his son is not heir apparent, and therefore the lord of whom the land is holden shall have the wardship of the son in this case which Littleton doth put. 3 *Co. fo.* 38 *a.*

Also, if a man have issue a daughter and heir apparent by his wife, that is an inheritrix, and the wife dieth, and the lands descend unto the daughter, living the father, holden by knight's service, she shall not be in ward, but privileged as a son and heir apparent should be; 3 *Co.* 38 *b.* 6 *Co.* 22. 7 *Co.* 13 *b.* which case is implied in this section of Littleton, though it be not expressed.

And so it seemeth if a man have issue by his first wife, a daughter, and by his second wife inheritrix, as aforesaid, one other daughter, and lands holden by knight's service descend unto the second daughter after the death of her mother, she is sufficient heir apparent unto her father, and shall not be in ward during her father's life, for they are both but as one heir apparent unto their father.

Note, if a man have issue two sons, his eldest son dieth without issue, the father also shall have the marriage of his second son; for he is now his son and heir.—*See for these matters in the book published by Edward Phillips.*

Note also, that one may be heir apparent and yet by matter *ex post facto* become no such heir apparent, able to enjoy this privi-

(1) So it is resolved in 22 *Eliz.* fo. 367. pl. 42. Vincent's case.—*Note in MS.*

lege; as for example, a man hath issue by his first wife inheritrix one daughter and heir, the mother dieth seised of land holden by knight's service, the daughter shall not be in ward, but privileged by her father; but if afterwards her father taketh another wife, and hath issue by her a son, now his son is heir apparent, and therefore his eldest daughter hath no longer privilege. 6 Co. 22.

And note, that this privilege and benefit to the heir apparent, the father cannot waive or refuse, no more than a man may waive and refuse the estate of tenancy by the curtesy, neither can he forfeit his right therein by [outlawry] in a personal action: 33 H. 6. 55. 7 Co. 13 b. neither may the father compel the son to marry, or have of him the value of his marriage, for nature hath annexed it to the person of the father, as the lord may.

The words in this place are, viz. the father during his life shall have the marriage of his heir apparent and not the lord, upon which words this case is put: lord and femme, tenants by service of chivalry, the tenant maketh a lease for life, and after the lord and the tenant intermarry, and have issue between them, the wife dieth, and after the father dieth, the son within age, that his executors shall not have the ward by reason of his seignory, for his father was *in jure naturæ*, which is more ancient and inseparable, and so vested in him to the use and advantage of the heir apparent, that no profit thereby shall be made to the father in this case, or to his executors, or any prejudice unto the said heir. 3 Co. 39.

By this case also we are taught, that this privilege doth extend only to free the body of the heir apparent, yet leaveth the wardship of the land unto the lord, from whom it originally was derived; and so may be observed that the law doth sometimes divide and sever the body from the land; for if a man have issue by [his] first [wife], and afterwards taketh another wife in possession of lands of estate of inheritance, holden by knight's service, and hath issue also by her, now the husband shall hold the land as tenant by the curtesy, but the lord shall have the custody and wardship of the body of the son, because he is not heir apparent unto his father. 2 E. 2. Gard. 3. Fitz.

Note also, it hath been lately resolved, that the grandfather shall not have this privilege to save his heir apparent from wardship, as the father might do; for the law judgeth that the blood is more cold between grandfather and his nephew, than it is between the father and his own child, and in many cases they are esteemed as strangers and of strange blood. 2 Co. 93. et 6 Co. 22 b. et vide *Ibid*, in 77 a.

But Pasche, 31 E. 1. the opinion was, that if the father also have not lands which may descend to his issue from himself, that in such cases the issue should be in ward for his mother's land, if he be within age at the time of the descent, although his father be now living; but the law is not so now taken. *Fitz. N. B.* 143. *Gard.* 154. *Fitz.*

§ 115. Note, if a man be seised of land which is holden by knight's service, and maketh a feoffment in fee to his own use, and dieth seised of the use, his heir within age, and no will declared by him, the lord shall have a writ of right of the wardship of the body and land, as if the tenant had died seised of the demesne. And if the heir be of full age at the time of the decease of his ancestor, in this case he shall pay relief, as if he had been seised of the demesne. And this is by the statute of 4 H. 7. cap. 17.

First it is to be observed throughout this book, that all those cases which are marked with this mark \*, are not Littleton's own cases, but added thereto by some students, and therefore they are not of that credit and estimation as his other cases are. *Plowd.* *Vide* 8 Co. 153 a, where he saith, that words in sect. 513, "*stude causam diversitatis*," were never added by Littleton himself, and yet in that place there is not that mark, and here is only a recital of the statute 4 H. 7. cap. 17, which was made for to reform one mischief amongst many other, which was in those days by the subtle invention of uses.

Note upon this statute in *Stamford's Prerog.* cap. 1. fo. 9. *et in Keilw.* 13 H. 7. 33. *et* 4 Co. 4 b. *Dyer*, fo. 8.

And though in some one king's reign certain of those fraudulent devices were reformed, and other kings' reigns some other, yet at the last to meet with them all, and to overtake them altogether, one statute was made in the 27th year of King H. 8. cap. 10. and of this matter you may read in *Chudleigh's case*, 1 Co.; and one point here may be well learned, that no delusion or fraud may be averred upon a will, for *nemo præsумitur esse immemor suæ æternæ salutis et maxime in articulo mortis et omne testamentum morte consummatum est.* 6 Co. 76. 27 H. 8. 7 b. And therefore this statute of 4 H. 7. cap. 17, which doth give the wardship of *cestuy que use*, maketh exception when any will is by him declared.



§ 116. Note, there is guardian in right in chivalry, and guardian in deed in chivalry. Guardian in right in chivalry is, where the lord by reason of his seignory is seised of the wardship of the lands and of the heir, *ut supra*. Guardian in deed in chivalry is, where in such case the lord after his seisin grants, by deed or without deed, the wardship of the lands, or of the heir, or of both, to another, by force of which grant the grantee is in possession. Then is the grantee called guardian *in fait*, or guardian in deed.

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And to end this chapter it is here to be observed, that Littleton doth mistake the law, viz. that the wardship of the body may be granted without deed, which point in law is resolved by great authorities contrary to Littleton's opinion (1). *Dyer*, 370 a. *Vide Perk. fo. 13 b.*

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## LIT. II. CAP. V.—SOCAGE.

§ 117. Tenure in socage is, where the tenant holdeth of his lord the tenancy by certain service for all manner of services, so that the service be not knight's service. As where a man holdeth his land of his lord by fealty and certain rent, for all manner of services; or else where a man holdeth his land by homage, fealty, and certain rent, for all manner of services; or where a man holdeth his land by homage and fealty for all manner of services; for homage by itself maketh not knight's service.

§ 118. Also, a man may hold of his lord by fealty only, and such tenure is tenure in socage; for every tenure which is not tenure in chivalry, is a tenure in socage.

(1) Here Littleton affirmeth, the wardship of the body may be granted over without deed; and here note a diversity between an original chattel of a thing that the property lieth in grant, and a chattel derived out of a freehold of any thing that lieth in grant. As if a man maketh a lease for years of a villein, this cannot be done without deed, neither can the lessee assign it over without deed,

because it is derived out of a freehold, that lieth in grant. But the wardship of the body is an original chattel during the minority, derived out of no freehold; and therefore as the law createth it without deed, so it may be assigned over without deed. 22 Eliz. *Dyer*, 371. 35 H. 8. *Bro. Grant*, 85.—*Note in MS.*—And see *Co. Lit.* 35 a, whence this case seems to have been added.—*Ed.*

Here are taught two things, 1. that in our law there are but two tenures, whereby lands and tenements are holden; that is, knight's service and socage; the former being proper to the warrior, and the latter to the husbandman; for as knight's service land required the service of tenant in warfare and battle abroad, so socage land, and that tenure, commanded his attendance at the plough, and other the lord's affairs of husbandry at home; the one by manhood defending the lord's life and person; the other by industry maintaining with rent, corn, and victual, his estate and family. *Lambert's Customs of Kent*, 529. . But both the one tenure and the other are specially described by divers names and appellations; as to hold by escuage, or by castle-guard, or by cornage, or by grand serjeanty, or *in capite*, are tenures by knight's service; and so tenure in burgage, ancient demesne, petty serjeanty, gavelkind, escuage certain, or any otherwise, not being tenure by knight's service, is a tenure in socage.

In ancient time gentlemen were distinguished from yeomen by the diversity of those tenures: *Lambert's Perambulations*, 121. but as nothing is more uncertain, than the estates we have in lands and livings, if that at best I may call an estate, which never standeth even so long since these tenures have been so indifferently mixed and confounded in the hands of each sort, that there is not any note of difference to be gathered by them; and against *miles* and tenant by knight's service were *liber socmannus*, *burgensis*, *villanus*, tenant in ancient demesne, and *serriens*, opposed; and tenants in ancient demesne, although they had their large liberty of discharge and quiet, as now, yet were reckoned so far from the worth of old tenants by knight's service, that they had not rank amongst the *liberi homines*. Vide *Selden*, 334, 355, in his *Titles of Honor*.

The second observation in this section is, that homage is not incident only to the tenure by knight's service: for homage may be parcel of the service of socage tenure, if so it were reserved at the creation of the tenure; and both these points Bracton, in his second book, cap. 35, described thus (1): *dici poterit socagium à socco et inde tenentes [qui tenent] in socagio socmanni dici poterunt, eò quod deputati sunt ut videtur tantummodo ad culturam, et quorum custodia et maritagium ad propinquiores parentes, jure sanguinis pertinebit. Et si aliquando inde de facto capiatur [homagium]*

(1) See Co. Lit. 85 a.—Ed.

(*quod pluries contingit*) non tamen propter hoc habebit dominus capitalis custodiam et maritagium, quia non semper sequitur homagium, licet quandoque.

§ 119. And it is said, that the reason, why such tenure is called and hath the name of tenure in socage, is this: because *socagium idem est quod servitium socæ*, and *soca idem est quod caruca*, &c. *scil.* a soke or plough. In ancient time, before the limitation of time of memory, a great part of the tenants, which held of their lords by socage, ought to come with their ploughs, every of the said tenants for certain days in the year to plough and sow the demesnes of the lord. And for that such works were done for the livelihood and sustenance of their lord, they were quit against their lord of all manner of services, &c. And because that such services were done with their ploughs, this tenure was called tenure in socage. And afterwards these services were changed into money, by the consent of the tenants and by the desire of the lords, viz. into an annual rent, &c. But yet the name of socage remaineth, and in divers places the tenants yet do such services with their ploughs to their lords; so that all manner of tenures, which are not tenures by knight's service, are called tenures in socage.

And Littleton saith, that the cause wherefore this tenure is said and hath the name of tenure in socage is this, *quia socagium idem est quod servitium socæ, et soca idem est quod caruca*; charou, in French, signifieth a plough, but [by] ancients authority *caruca* is not a plough, but a chariot, or such like, as *caruca cum junctura ligata*.—(See in the preface to Hengham, fo. 6. and in the notes upon Hengham, 127.)

The words following in this section are, And in ancient time before the limitation of time of memory, &c. for the understanding whereof see sect. 170.

Great part [of] the tenants, who did hold of their lords by socage, did come with their ploughs certain days yearly for to plough and sow the demesnes of the lord, and because such works were made for the livelihood and sustenance of the lords, they were quit

against their lords for all other manner of services. Which manner of service changed afterwards into a yearly sum of money, but the original name doth continue at this day: *see 4 Co. 88 a. and in Sir John Davies' R. fo. 3 a.* as the like is in other points of our law, for at this day the view of frank-pledge, and the putting in of frank-pledges, and the *decemarii* are but bare names of things past; the use and substance is absolute and gone. *The Lord Chancellor's [Egerton] Speech, 78.* and more of the change of service see sect. 130. Also, there were tenants in ancient demesne before the Conquest, and for certainty therein, and to know of what manors such tenants did hold, it appears by the book of Domesday, that such tenants as did hold of any of those manors that were in the hands of King Edward the son of King Ethelred, or of King William the Conqueror, were tenants in ancient demesne, and these tenants then had, and yet have, these privileges amongst others; for that they were bound by their tenure to plough and husband the king's demesnes, &c. before and in the Conqueror's time, therefore they were not to be returned burgesses to serve in parliament, to the end they might intend the king's husbandry the better: 2dly. they were not to be contributory to the knights of shires that serve in parliament, which privileges, though the cause ceaseth, continue to this day. *9 Co. Pref. fo. 5 a. and nota, in Sir John Davies' book, fo. 3 a.*

And in the old book of the *Terms of our Law, fo. 176*, it is said, the alteration and change of this original service into a yearly rent was in the reign of King Henry 1. and herewith doth agree *Gervasius Tilburiensis*, who writ in the time of Henry 2. until the time, saith he, of King Henry 1. the kings used not to receive money of their lands, but victuals for the necessary provision of their houses, and towards the payment of the soldiers' wages, and such like charges, money was raised out of the cities and castles, in which husbandry and tillage was not exercised; but at the length when as the king being in the parts beyond the seas, needed ready money towards the furniture of his wars, and his subjects and farmers complained that they were grievously troubled by carriage of victuals into sundry parts of this realm far distant from their dwelling-houses, the king directed to certain discreet persons, who having regarded to the value of those victuals, should reduce them into reasonable sums of money, the levying of which sums they appointed unto the sheriffs, taking order withall that he should pay them at the scale or beam, that is to say, he should pay 6d. over

and above every pound weight of money, because they thought that the money in time would wax so much the worse for the wearing, &c. *Lambert's Perambulation of Kent*, 214.

§ 120. Also, if a man holdeth of his lord by escuage certain, *scil.* in this manner, when the escuage runneth and is assessed by parliament to a greater or lesser sum, that the tenant shall pay to his lord but half a mark for escuage, and no more nor less, to how great a sum, or to how little the escuage runneth, &c. such tenure is tenure in socage, and not knight's service. But where the sum which the tenant shall pay for escuage is uncertain, *scil.* where it may be that the sum that the tenant shall pay for escuage to his lord may be at one time more, and at another time less, according as it is assessed, &c. such tenure is tenure by knight's service.

(1) In the chapter of Escuage Littleton hath declared the law touching escuage uncertain, which maketh a tenure by knight's service, *vide ante*, sect. 98, 99; and in this place he speaketh of escuage certain, which is socage, and not knight's service.

§ 121. Also, if a man holdeth his land to pay a certain rent to his lord for castle-guard, this tenure is tenure in socage. But where the tenant ought by himself or by another to do castle-guard, such tenure is tenure by knight's service.

In this place is shewed, if a man do hold his land for to pay a certain rent unto his lord for castle-guard, such a tenure is a tenure in socage; but where the tenant ought, by himself or by another, to keep the castle, such a tenure is a tenure by knight's service; and it is said in 4 Co. 88, in *Sir William Capell's case*, that in

(1) This short note on this section is in the margin of the MS. and seems to have been added subsequently, to account for the omission of this section.

I have put it in the text, as the place which it was evidently intended to occupy.—Ed.

ancient time all tenures for castle-guard were knight's service, but afterwards many of those tenures were changed by mutual consent of the lords and tenants into a yearly rent; and though it be still said, that such yearly rents be paid *pro wardo castri*, yet it is now socage tenure.

And when the tenure is by certain [rent] for castle-guard, although the castle be utterly ruined, and fallen down, yet the lord doth not thereby lose his rent; neither is it suspended till the castle be re-edified, but he may distrain for the same [after the] usual days of payment; but if the tenure be by castle-guard, which is knight's service, in that case the personal service is suspended till the castle be re-edified; in both cases though the castle be utterly ruined, yet the tenure doth remain. *See Sir John Davies' R. 3 a.*

The original of this tenure was made by William the Conqueror, when he gave to John Fynes, a nobleman, not only the custody of Dover Castle, but the government of the rest of the ports also, by gift of inheritance, naming him Constable of Dover and Warden of the Cinque Ports; and to the end that he should be of sufficient ability to bear the charge of the defence thereof, he gave him to the number of 15 knight's fees of land, and possession, willing him to communicate some parts of that gift to such other valiant and trusty persons, as he should best like of, for the more sure preservation of that his most noble and precious peer, which he did accordingly, and imparting liberally unto them of that which he had received, bound them by tenure of those lands received of the king, to maintain 112 soldiers amongst them, which number he so divided by months of the year, that 25 were continually to watch and ward with the castle, for their several stints of time, and all the rest ready at commandment upon whatsoever necessity; but that military service at this day is redeemed with a yearly payment of money; for when Sir Hubert de Burgh was constable of this castle, to have every month new wardens for the castle-guard, [he] procured by the assent of King H. 3. and of all that held that castle, that every one should send for the ward of one month 10s. and that therewith certain men elect and sworn, as well horse as foot, should be waged for to keep the castle. *Lambert's Perambulation, 124, et seq. Camden's Kent, 345. And vide Fitz. N. B. 256 a, and Stamf. Prerog. cap. 7. fo. 29 b*, an opinion that, notwithstanding this mutual agreement, the ancient tenure by knight's service is not changed into socage tenure, but saving the reverence due to those justices, it was in 4 Co. 88, before mentioned, that this rent

so paid *pro wardo castri*, is in satisfaction *wardi castri*, for in that case and such like (*pro*) doth signify full and perpetual recompence and satisfaction, and not a condition or satisfaction temporary or for a time, so that the lord may have the castle-guard when he will, for the seisin of the rent is not the seisin of the castle-guard in that case. *Nota in Sir John Davies' R. fo. 3 a, b.*

§ 122. Also, in all cases where the tenant holdeth of his lord to pay unto him any certain rent, this rent is called rent service.

This section concerning rent may be reserved to the twelfth chapter of this book, which teacheth of all manner of rents.

§ 123. Also, in such tenures in socage, if the tenant have issue and die, his issue being within the age of fourteen years, then the next friend of that heir, to whom the inheritance cannot descend, shall have the wardship of the land and of the heir until the age of fourteen years, and such guardian is called guardian in socage. For if the land descend to the heir of the part of the father, then the mother, or other next cousin of the part of the mother, shall have the wardship. And if land descend to the heir of the part of the mother, then the father or next friend of the part of the father shall have the wardship of such lands or tenements. And when the heir cometh to the age of fourteen years complete, he may enter and oust the guardian in socage, and occupy the land himself, if he will. And such guardian in socage shall not take any issues or profits of such lands or tenements to his own use, but only to the use and profit of the heir; and of this he shall render an account to the heir, when it pleaseth the heir after he accomplisheth the age of fourteen years. But such guardian upon his account shall have allowance of all his reasonable costs and expences in all things, &c. And if such guardian marry the heir within the age of fourteen years, he shall account to the heir, or his executors, of the value of the marriage, although that he took nothing for the value of the

marriage; for it shall be accounted his own folly, that he would marry him without taking the value of the marriage, unless that he marrieth him to such a marriage, that is as much worth in value as the marriage of the heir.

This manner of socage wardship is grounded upon an ancient rule, *nunquam custodia alicujus de jure alicui remanet de quo habetur suspitio quod possit vel velit aliquod jus in ipsa hæreditate clamare.* Glanville, lib. 7. cap. 11, and Bracton, lib. 1. cap. 37, and Britton, cap. 66. See the notes upon Fortescue, cap. 44. fo. 51, and in Plowd. 295, Carell's case.\*

And it is to be observed, that the common law of England, and the civil law, are divers in this point concerning the tutorship of infants, whereof read the reason for both parts in Fortescue, cap. 44.

And as the heir, in this case of socage tenure, may enter and expulse his guardian, after he hath accomplished that age which by the law is appointed, so the guardian during his lawful possession may not be disturbed, neither by the heir himself nor by any other, though peradventure they think to do more for the profit of the heir, than the rightful guardian will do; for the guardian is called guardian in socage, as the author saith in this section, and guardian in socage, as the author saith in this section, may have an action of trespass against a stranger, for entering into any part of that land, &c. and he may maintain a writ of ravishment *del gard*, or ejectment *de gard*, and a writ of right of ward; and if the heir do put him from his possession, he may re-enter well, 15 H. 7. 13 b. 18 H. 7. 46. Keilw. Fitz. N. B. 139 I. 140; for although all he doth, is intended to the use of the ward, and not to his own benefit, yet his interest is settled in him by law, and they whose estates are by law, may maintain their possession, and punish any disturber thereof, 4 H. 7. 3. 18 H. 7. 47 a, in Keilw. So the law doth give to the king the profits only of the lands of a man that is outlawed in an action personal, as appeareth 41 H. 7. 7; yet the king in that case may justify for damage feasant, and may have an action of trespass, because he hath interest in the land, though no estate. 15 H. 7. 2 b.

It is apparent by the premises, and by the statute made at Marlebridge, that the guardian in socage hath no interest, but only to the use of the heir, and not to his own use; the consequence whereof is that which followeth here, sect. 125, his executors shall not have the custody which the testator had; and if the guardian be out-



lawed or attainted, he shall not forfeit the custody to the king, *Plowd.* 294. *Vide Bro. Gard. b*; nor a guardian in socage cannot grant that estate, never to be good after the death of such guardian; or if a man be guardian in the right of his wife, if he do demise or grant any part thereof, and die, his wife surviving, shall avoid it; so if the wife die, the husband's interest shall be avoided by the next of the blood to the infant, for *cessante causâ cessabit effectus, ibid.*

And in regard that no benefit shall accrue to the next of kin, by bearing that office, and also because of dislike or distrust which the father of the infant hath in him to whom the law will dispose the guardianship, a question hath been moved, if the father may by his testament bequeath and dispose of that office during his child's minority to some other his trusty friend, though he be not next of blood unto the heir, *7 et 8 H. 8. pl. 1, in Keilw.* Also if he, that by the law should be guardian in socage, happen himself to be within age, a fool natural, or a madman, it seemeth to be reason, that he be not admitted to the office of trust; *qui seipsum regere non potest nec alios.*

And concerning the time or age when the infant in this case may bring his action of account, doubt hath been made, some affirming with Littleton in this place, that at any time after he hath accomplished his age of fourteen years; and their reason is, because the law hath settled in him the right and possession in the land, which is the principal and real, therefore *à fortiori* he may have an action of account for the profits received out of the land, being a thing personal, and that (*Keilw.* 131) others say, that Littleton in this point is against himself, for before, *sect.* 108, he saith, that in the like case the infant may have an account when he cometh to his full age, which is twenty-one years: also Keble doth confess, that this case hath been oftentimes adjudged; and the statute of Marlebridge, cap. 17, upon the words "*cum ad legitimam aetatem pervenit*" hath been so construed, and the law so used always; this use doth make the law, because use and practice [are] ever the best expositors of the true intent and meaning of statutes; and the reason which is made for this side is, because before his age of twenty-one years the law doth not judge him of sufficient discretion to bring an action, neither can he before that age make a sufficient acquittance (1). *29 E. 3. 4. F. N. B. 118 b.*

(1) See Co. Lit. 89 a, Lord Coke has stated and resolved this point much more logically and concisely.—Ed.

But *nota*, a writ of account may be brought by the heirs in gavelkind against the guardians, at any time after they do accomplish their age of fifteen years; for then they may enter into their lands, and sell it by the custom which is the principal. *Crompton's Courts*, 116. 29 E. 3. 4. *Avowry*, in *Fitz.* 220.

And note, that the church of Hereford hath such a custom, that the dean and chapter shall have the wardship of the land, and of the heirs of their tenants, who be within age, holding them by socage or by knight's service, &c.; and this was adjudged a good custom, and they did seize an infant who did hold in socage by the custom. 8 H. 3. *Fitz. Prescription*, 50.

§ 124. And if any other man, who is not the next friend, occupies the lands or tenements of the heir as guardian in socage, he shall be compelled to yield an account to the heir, as well as if he had been next friend; for it is no plea for him in the writ of account to say, that he is not the next friend, &c. but he shall answer whether he hath occupied the lands or tenements as guardian in socage or no. But *quare*, if after the heir hath accomplished the age of fourteen years, and the guardian in socage continually occupieth the land until the heir comes to full age, *scil.* of twenty-one years, if the heir at his full age shall have an action of account against the guardian, from the time that he occupied after the said fourteen years, as guardian in socage, or against him as his bailiff.

This section containeth two several matters; first is confirmed by many authorities, viz. 12 H. 7. 26 *a. per Constable*. 4 E. 3. *Accompt*, 107. *Fitz.* 13 E. 3. *Accompt*, 77. *Fitz.*

The second part whereof Littleton maketh a *quare* (1), is well resolved by *F. N. B. fo*, 118 *b*, in these words; if a man, during the non-age of the heir, enter into the lands of the heir, which he hath by descent, and take the profits thereof to the use of the heir; the heir at his full age shall have a writ of account against him, as

(1) Lord Coke says, that this *quare* came not out of Littleton's quiver: and he resolves the doubt by quoting *F. N. B.* 118.—*Ed.*

guardian of the profits received, till the heir doth come to the age of fourteen years; [and for the profits received after he came to the age of fourteen years] the heir shall have a writ of account against him for those, as bailiff, and not as guardian, for he cannot be guardian to the heir longer for [socage] lands; [but] the heir shall not have an action of account against one as guardian, till the heir be of full age, twenty-one years; and this is by the words of the statute, which are *qui cum ad atatem pervenerit, &c.* But he may have an action of account against a bailiff during his non-age, at what time he will, against him who taketh the profits of his lands which he hath by descent, if he be not guardian in socage in right.

§ 125. Also, if guardian in chivalry makes his executors and die, the heir being within age, &c. the executors shall have the wardship during the non-age, &c. But if the guardian in socage makes his executors and die, the heir being within the age of fourteen years, his executors shall not have the wardship; but another, the next friend, to whom the inheritance cannot descend, shall have the wardship, &c. And the reason of this diversity is, because the guardian in chivalry hath the wardship to his own use, and the guardian in socage hath not the wardship to his own use, but to the use of the heir. And in this case where the guardian in socage dieth before any account made by him to the heir, of this the heir is without remedy, for that no writ of account lieth against the executors, but for the king only.

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Here two things also are taught; 1st, a diversity between guardian in chivalry and guardian in socage; the one hath an interest in the wardship of the infant to his own use, but the other only to the use of the heir; and the consequence is, that after the death of the guardian by knight's service, his interest shall go to his executors, as his other goods and chattels shall; but executors of guardian in socage shall not have to do with the estate of the infant, for nothing shall be to the executors of any man, but such wherein the testator had property to his own use. *See Plowd. 293; and see in 6 Co. 57 b.*

The second observation is, that no action of account lieth against the executors; which rule is general, not only in the case of account against the executors of any bailiff or receiver; wherewith

agreeth *Fitz. N. B.* 117 C.; and the reason given for it is, that the law doth intend that executors cannot have knowledge of other man's receipts, 7 H. 8. 180 b. in *Keilw. et in Dyer*, 23 a. 48 E. 3. 2 a. *Mich.* 2 H. 4. 13 b; in which last book is a *caveat*, that if the executor do not shew this matter in abatement of the writ, but do enter in account, he shall be chargeable. In the conclusion of this section Littleton saith, that no writ of account lieth against executors, 4 E. 4. 25 a, by Littleton; but that the king may have an action of account against the executors of his accountant or debtor; the reason is, because *thesaurus regis est pacis vinculum et bellorum nervi*, and therefore the law doth give unto the king full means and remedy to recover it. *Vide* 3 Co. 12 b. 11. 91 b.

If the king's officer do not account, but die, and make no executors nor administrators, if he had any land at the time of the assumption of the office, the ter-tenant shall be charged. *Sir Wm. Seyntlow's case*, 5 Eliz. 224. pl. 32, [ *Dyer*. ]

And here note two things; 1st, that Littleton did learn this point of law touching the king's prerogative out of the Exchequer, and not elsewhere; for in that court such matters are treated, and there the accounts for the duties of the king are discussed and answered, and who shall account, and who shall not: and there be records to warrant it; and because he found it so there used, he did affirm the law so to be, *Plowd.* 320 b; and for matter criminal touching the king's crown and dignity, the proper court for all those matters is the King's Bench; and for other matters concerning the title of lands, tenements, goods and chattels, the Common Place is the proper court; *vide* sect. 157; for as if a man do buy a horse, and will have a good assurance therein, he must [buy] it in a market or fair, and then pay toll; so if the purchaser of lands will therein have perfect assurance, he must in the Common Place levy a fine thereof. 3 Co. 78 b.

The Chancery also may be well called *officina reipublicæ*, from whence all original process do proceed. *Vide* the Lord Chancellor's *Speech of Post-nati*, 39.

The second thing to be noted is, that this point of the king's prerogative was by the order of the common law, as many others, for it is not mentioned in the treatise of *Prerogativa Regis*. *Plowd.* 322 a.

§ 126. Also, the lord, of whom the land is holden in socage, after the decease of his tenant, shall have relief in this manner. If the tenant holdeth by fealty and certain rent to pay yearly, &c. if the terms of payment be to pay at two terms of the year, or at four terms in the year, the lord shall have of the heir his tenant, as much as the rent amounts unto, which he payeth yearly. As if the tenant holds of his lord by fealty, and ten shillings rent payable at certain terms of the year, then the heir shall pay to the lord ten shillings for relief, beside the ten shillings which he payeth for the rent.

In the same manner it is, if a man be seised of certain land which is holden in socage, and maketh a feoffment in fee to his own use, and dieth seised of the use (his heir of the age of fourteen years or more, and no will by him declared), the lord shall have relief of the heir, as afore is said. And this by the statute of 19 H. 7. cap. 15.

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In the chapter of Knight's Service is spoken of relief; but this payment of money or other rent that is payable by this heir in socage, is not properly a relief; for in the statute 28 E. 1, it is said, where any relief is given, there wardship is incident, *et à contrà*, and to that effect is *Bracton, lib. 2. cap. 36. numero 8*; and read *Dr. Cowell's Interp. verbo Relief*.

The words of the statute [are] "a free socman shall not give ward nor relief, but he shall double his rent after the death of his ancestor, according as he used to pay, and shall not be immeasurably grieved."

The relief for tenure in chivalry is according to the quantity of that tenure, viz. the fourth part, as before in that chapter appeareth; but in socage it must be according to the quantity of the quit rent and rent service, which those tenants did yearly pay unto the lord, of whom they have been holden.

So the relief which he must pay is one year's overplus, that is to say, that money for his relief must be paid presently; but his rent is to be paid at his usual rent days, and not otherwise. 16 H. 7. 4b.

If a man do hold of his lord by fealty, and 12*d.* rent, and after the lord releaseth or confirmeth the estate of the tenant, to hold of

him by *12d.* for all manner of services and demands, the question was, if the tenant die, whether his heir shall double his rent of *12d.* or not, and by the opinion of [the] books, he shall not; for by those general words "all demands," the relief is extinct, as well as if relief had been by special words released. *Keilh.* 163. *Vide* [40] *E. 3.* 22. *et* 47. 18 *E. 3.* 26 *a.* *Avowry*, 99. *Fitz.* 1 *Co.* 111 *b.* *Relief*, 13. *Fitz. Avowry*, 89.

And more concerning relief, see in the next precedent chapter, *sect.* 113.

And for a conclusion of this section, Littleton sheweth, that by the statute 19 H. 7. 15, the lords shall not be defrauded of their reliefs, though the tenants did put their lands into feoffees hands to their use; of which fraudulent practices used to defeat lords of their wardship, see also in the last chapter, *sect.* 115, and how at this day all those fraudulent practices of uses are remedied: By the statute 27 H. 8. cap. 1, a man may make his will of all his lands holden in socage, yet there is a proviso therein, that the lords shall not lose their relief, nor heriots.

§ 127. And in this case, after the death of the tenant, such relief is due to the lord presently, of what age soever the heir be; because such lord cannot have the wardship of the body, nor of the land of the heir. And the lord in such case ought not to attend for the payment of his relief, according to the terms and days of payment of the rent; but he is to have his relief presently, and therefore he may forthwith distrain after the death of his tenant for relief.

The relief for the lord in this case is due to him presently after the death of his tenant in socage, in regard that he cannot have the wardship of his land, or of his body, as the [lord] by knight's service might have; and though the heir in socage be within the age of fourteen years at the time of the death of his ancestor, the lord nevertheless shall not have the custody of him, nor of his lands, but his next cousin in form as before is said, who, if they pay unto the lord his relief due, shall be allowed thereof amongst other reasonable allowances upon their account. *Vide sect.* 123.

§ 128. In the same manner it is, where the tenant holdeth of his lord by fealty and a pound of pepper or cummin, and the tenant dieth, the lord shall have for relief a pound of cummin, or a pound of pepper, besides the common rent. In the same manner it is, where the tenant holdeth to pay yearly a number of capons or hens, or a pair of gloves, or certain bushels of corn, or such like.

In this place is shewed, that it is not of necessity that the rent payable by the tenant be always *in pecuniis humeratis*, so it be *per quid tale quod tantundem valcat, quæ consistunt in pondere, numero, vel mensurâ, in solido, vel in liquido, sicut frumento, vino, oleo, secundum quod redditus diversis modis accipiantur.* Bracton, lib. 2. cap. 36. numero 8; but if the tenure be by homage, or fealty, or suit, or to cover the hall of his lord [which], are not annual, no relief [is due].

§ 129. But in some case the lord ought to stay to distrain for his relief until a certain time. As if the tenant holds of his lord by a rose, or by a bushel of roses, to pay at the feast of St. John the Baptist, if such tenant dieth in winter, then the lord cannot distrain for his relief, until the time that roses, by the course of the year, may have their growth, &c. And so of the like.

In this place is shewed a special case, wherein the tenant may take a further time, and the lord may not before future convenient season of the year, distrain for his relief due for socage tenure, *lex non cogit ad impossibilia*, 5 Co. 22, *et lex non præcipit inutilia, quia inutilis labor stultus.* Fo. 89, *ibid.*

§ 130. Also, if any will ask, why a man may hold of his lord by fealty only for all manner of services, insomuch as when the tenant shall do his fealty, he shall swear to his lord that he will do to his lord all manner of services due, and when he hath done fealty, in this case no other service is due: to this it may be said, that where a tenant holds his land of his lord, it behoveth that he ought to

do some service to his lord. For if the tenant nor his heirs ought to do no manner of service to his lord nor his heirs, then by long continuance of time it would grow out of memory, whether the land were holden of the lord, or of his heirs, or not, and then will men more often and more readily say, that the land is not holden of the lord, nor of his heirs, than otherwise; and hereupon the lord shall lose his escheat of the land, or perchance some other forfeiture or profit which he might have of the land. So it is reason, that the lord and his heirs have some service done unto them, to prove and testify that the land is holden of them.

§ 131. And for that fealty is incident to all manner of tenures, but to the tenure in frank-almoign (as shall be said in the tenure of frank-almoign), and for that the lord would not at the beginning of the tenure have any other service but fealty, it is reason, that a man may hold of his lord by fealty only; and when he hath done his fealty, he hath done all his services.

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The effect of these sections is to shew [that] tenures by the common law were created by the lord according to his pleasure, to hold by more or by lesser service, by knight's service, or in socage; but note at this day after the statute of *quia emptores terrarum*, which was made 18 E. 1, no tenures may be newly created by any in fee simple, except by the king only, and except the donor in tail.

Also, here is shewed the benefits which a lord hath by his seignory, besides his yearly rent service; viz. escheat of the very land or tenancy, in case the tenant die without heir; forfeiture, if he commit felony; and other profits, viz. ward, marriage, and relief, if the tenant hold in chivalry, and the doubling of the rent as aforesaid, if it be holden in socage, *aide pour faire fils chevalier, et pour fille marier; Escuage.*

Note, *Wheeler's case*, in 6 Co. 6 b, et sect. 227, and that fealty is incident to every tenure, except frank-almoign; but tenant at will shall not do fealty, because he hath no such estate according to the course of the common law; but otherwise it is of a tenant according to the custom of the manor.

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§ 132. Also, if a man letteth to another lands or tenements for term of life, without naming any rent to be reserved to the lessor, yet he shall do fealty to the lessor, because he holdeth of him. Also, if a lease be made to a man for term of years, it is said, that the lessee shall do fealty to the lessor, because he holdeth of him. And this is well proved by the words of the writ of waste, when the lessor hath cause to bring a writ of waste against him; which writ shall say, that the lessee holds his tenements of the lessor for term of years. So the writ proves a tenure between them. But he, which is tenant at will, according to the course of the common law, shall not do fealty; because he hath not any sure estate. But otherwise it is of tenant at will, according to the custom of the manor: for that he is bound to do fealty to his lord for two causes. The one is, by reason of the custom; and the other is, for that he taketh his estate in such form to do his lord fealty.

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And so fealty is to be done by the lessee for life, or for years, to his lessor, and to him in the reversion, 9 *H.* 6. 43; and although 10 *H.* 6. 13, all the justices say, that tenant for years shall not do fealty; that hath been understood, not to the lord, but to his lessor shall; and Littleton doth prove his opinion by the form of the writ of waste, which is the best proof of any point in law; for the form of all writs are in the Register, which book is a sufficient foundation of the law, *Plowd.* 228 *b*; and the like proof he doth make before, *sect.* 67. 5 *H.* 7. 11 *a*, according.

And so the student must observe, that he must apply his endeavours not only to know the maxims and principles of the law, and the positive laws, but also the form of the writs; for in them, and under them, are also contained the knowledge of a great part of the law; 8 *Co. Pref. fo.* 5, where he hath reported *Calve's case*, *fo.* 32; to this end the student's seeing their singular use, will in the beginning of their study learn them, or the least principallest of them, without book, whereby they shall attain unto three things of no small moment; 1st, to the right understanding of their book; 2d, to the true sense and judgment of the law; and lastly, exquisite form and manner of pleading.

Also, here is shewed, that a lease for life or for years, may be without reservation of any rent; for the reservation of any rent is

not of necessity, or of the substance of the lease, as in 5 Co. 55, which is contrary to the vulgar opinion; for you shall not see any lease drawn by an imperist, but some rent or other is reserved, though but pepper-corn, they supposing that otherwise the lease is not good in law.

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## LIB. II. CAP. VI.—FRANK-ALMOIGN.

§ 133. Tenant in frank-almoign is, where an abbot, or prior, or another man of religion; or of holy church, holdeth of his lord in frank-almoign; that is to say in Latin, *in liberam eleemosinam*, that is in free alms. And such tenure began first in old time. When a man in old time was seised of certain lands or tenements in his demesne as of fee, and of the same land infeoffed an abbot and his covent, or prior and his covent, to have and to hold to them and their successors, in pure and perpetual alms, or in frank-almoign; or by such words, to hold of the grantor, or of the lessor, and his heirs in free alms: in such case the tenements were holden in frank-almoign.

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Of the political government used and practised by the ancient kings of this realm, as well in times of peace as of war, may appear sufficient by that which is aforesaid, in the last chapter of Knight's Service, and Socage; and in this present chapter is declared the like providence and care which those ancient kings had, to enable and preserve the happy estate of the church of God within their dominions, they knowing and acknowledging that every well-governed commonwealth stands principally on two parts; the politic part, which consisteth of the prince and people; and the ecclesiastical part, which standeth *in sacris et sacerdotibus*; and therefore well said the emperor, two of the greatest things that God ever gave unto the world, meaning earthly things, was the empire or secular government, whereby the outward man is ordained and made, as Aristotle, *bonus civis*, that is a good and loyal subject; and the priesthood, whereby the inward man is made, as the said Author testifieth *bonus vir*, that is a good man, wonderful effects of the whole government in general; neither can the one of these be wanting, but the other will be ruined, and brought to dissolution. *Doctor Ridley, 224*: therefore Constantine the Great being ravished with the love of re-

ligion, and the good opinion he had of the ministers of his time, erected churches, and endowed them with large possessions, and granted them sundry large immunities, whereby they might more securely intend to their preaching of the word of God, and the winning of souls to the Christian congregation, wherein they labored with all their might and power, God still adding to the number of the elect; neither did he this alone in his own person, but he also gave leave to all other his subjects that would do the like; and in imitation of him, ancient princes of this realm have done so also: *Poliolbion*, 188, *et seq.* and in the statute made 8 Eliz. cap. 1, the estate of the clergy is said to be one of the greatest and highest estates of this realm.

And divers things in this section are observable; first, that none are capable to receive in frank-almoign, but ecclesiastical men, and such as have titles and dignities in the church government, who have capacity to take to them and their successors; whereof examples are here put of abbès and priors, and their convents, who are dead persons in law, but only the abbè, or prior, who is sovereign, for otherwise he should be but as one of the other monks of the convent. *Sect.* 655. And when he is made abbè, or prior, he is a man able in the law only to purchase, and to have lands and tenements or other things unto the use of the house. *Sect.* 296. And some say that a prior, howsoever it soundeth, was indeed but the name of a second officer, because the bishop himself was accounted the very abbot; for in old time the bishop was for the most part chosen out of such monasteries, and therefore most commonly had their palace adjoining, and governed as abbots there, by means whereof it came to pass, that such abbies were not only much amplified in wealth and possessions, but also by favor of the bishops, their good abbot over-looked their near neighbours. *Lambert's Perambulation of Kent, fo.* 238.

These are corporations by the spiritual law; 14 *H.* 8. 3 *b*; and are called regular and religious, because they have entered into religion, and profess three things, obedience, voluntary poverty, and perpetual chastity. 2 *Co.*

The second observation is, that in those ancient times lands and tenements were given to such spiritual corporations; for so it was thought expedient for the perpetual relief of the church, that lands themselves should be given and preserved to the church, and not be sold by the donor, and the price thereof given as it was in the Apostles' time: *Carleton's book, cap.* 5: neither did the endowment

of the primitive church stand in tithes, but in good temporal and finable lands; for it is manifest out of our own stories, both in the Briton's time, during whose reign there are reported to have been fifteen archbishops in the see of London well endowed with possessions, and if they were archbishops, then must necessarily also follow there were bishops, for that these are respective one to the other. The like is written of the Saxon's reign, under whom the see of Canterbury, the see of London, the see of Rochester, and the see of York, for these four were first set up again after the Saxons first received the faith at the preaching of Augustine, Melitus, and Justus Paulinus, are reported to have been enriched with large dominions and possessions given to every of them for their maintenance. *Dr. Ridley, 167.*

The third observation is, that in this case the law doth require prescript form of words in the purchase, which might not be implied by any periphrasin or circumlocution, whereof you may read some more in 4 *Co.* 39 *b.* 20 *II.* 6. 36 *b.*; and in any other books, in the first section of Littleton.

Fourthly, here to be observed that the tenant in frank-almoign doth hold his land of the donor, although he do no temporal service, and herewith agreeth *sect.* 141 and 540; and in 5 *II.* 7. 37 *a.* Vavisor and divers Justices say, lands given in frank-almoign do lie in tenure, and yet it is but prayers; and 7 *E.* 4. 10 *b.*, where it is agreed, that lands in frank-almoign are still within the fee and seignory of the lord; for the grantee of the king of estrays *infra feoda sua* shall have them within the lands, which are holden of him in frank-almoign; [and the tenant in frank-almoign] shall have against his lord a writ of mesne or *ne injuste vexes*: and see 4 *Co.* 11 *a.*

The last (1) observation is, that although it seemeth here, that the purchase must not only be in the name of the abbè or prior, but also in the name of the convent, to have and to hold to them and their successors the convent, yet I take the law to be, that the feoffment made to an abbè or prior by the only words "to have and to hold to him in frank-almoign," is sufficient, and shall be effectual to convey the inheritance in succession; for the naming of the convent in that case is idle, as may appear by the section 655; and in

(1) In the MS. it is "the *first* observation," so that this passage should either be placed at the beginning of the next

section, or the word *last* be substituted: it may be applied to either section indifferently.—*Ed.*

this and in like cases, feoffments and grants in fee are good without limitation of any estate, and of this matter you may read in *Sir John Davies' Book*, 45 a.

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§ 134. In the same manner it is, where lands or tenements were granted in ancient time to a dean and chapter and to their successors, or to a parson of a church and his successors, or to any other man of holy church and to his successors in frank-almoign, if he had capacity to take such grants or feoffments, &c.

*Nota*, that a parson of a church had capacity in ancient time to purchase to him and to his successors incumbent. *Bro.* 14 E. 4. 12. *per Danby*; *accordant*, 12 H. 8. 9. 12 R. 2, *tit. Devise*, in *Fitz.* 27. and 10 Co. *Pref.* fo. 2 a.

§ 135. And they, which hold in frank-almoign, are bound of right before God to make orisons, prayers, masses, and other divine services, for the souls of their grantor or feoffor, and for the souls of their heirs which are dead, and for the prosperity and good life and good health of their heirs which are alive. And therefore they shall do no fealty to their lord; because that this divine service is better for them before God, than any doing of fealty; and also because that these words, (frank-almoign) exclude the lord to have any earthly or temporal service, but to have only divine and spiritual service to be done for him, &c.

By this a man may see the suppositions of those times, how the common law did receive and take notice of the law of the church, insomuch that it did give way unto it, and in respect of divine service the temporal did cease, for in that case no service is due. *Vide sect.* 142.

Note also, that Littleton doth frame one other reason of it, from the etymology of the word "frank-almoign," but it is no certain rule always to ground upon the etymology of the words.

And therefore it seemeth in some books, that if, in a gift in frank-almoign, the donor had reserved by express words fealty, rent,

or other terrene service, such an ecclesiastical person should do those services, and yet hold by frank-almoign. *Vide* 4 E. 4. 34. 30 E. 3. 23; and see 13 E. 1. *Formedon*, 63, of a gift in frank-marriage, and here see other books in *Kitchin*, *tit. Frank-marriage*, but note 13 H. 4. *tit. Mesne*, 74, the tenure or reservation of frank-almoign is good, and void for the rest, agreeable to Littleton.

And it seemeth to me, that one conveyance cannot make tenure of one piece of land, both in frank-almoign and also by temporal service, but either the temporal service being expressed must suppress the operation of the law, which was implied in the word "frank-almoign," according to the rule *expressum facit cessare tacitum*; 5 Co. 97; nevertheless the law shall judge of the premises of the deed being perfect and good to create a tenure in frank-almoign, and also that all that subsequent matter contrary thereunto be void, according to the other rule in 3 Co. 10, *utile per inutile non vitiatur*; and it is against the virtue of the word "frank-almoign" to hold by any rent, as it is agreed in *Plowd. Com.* 305, and so in case of frank-almoign to hold by any temporal service, it is against the nature of the tenure, and it is a rule in law, that every deed by any man, shall be understood and expounded most strongly against him who made it, and most beneficially for him to whom it was made.

§ 136. And if they, which hold their tenements in frank-almoign, will not, or fail to do, such divine service (as is said), the lord may not distrain them for not doing this, &c. because it is not put in certainty what services they ought to do. But the lord may complain of this to their ordinary or visitor, praying him that he will lay some punishment and correction for this, and also provide that such negligence be no more done, &c. And the ordinary or visitor of right ought to do this, &c.

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In this place two things are observable; 1. That forasmuch as the prayers, in this case of frank-almoign, are not put in certain, the abbess or other tenants in frank-almoign shall not be subject to any distress, if divine service be not done, and for that cause he is not subject to *accessavit*, or to do fealty. *Finch*, 139 a. 2. The only remedy for the donor or his heirs in this case is, to complain to the ordinary or visitor, who of right ought to put punishment and correction thereof, and also provide that such negligence be no more

done or committed; for it appeareth in our books, that all those ecclesiasticals are visitable commonly by the bishop or ordinary, who hath the power of visitation *de mero jure*, as it is said in *Dyer*, 273 *b.* or by special privilege, and exemption by some other; and those abbees and priors that were exempted from the jurisdiction of the diocester, had in themselves episcopal jurisdiction within their precincts, and were lords of the parliament, and they were distinguished from the rest by wearing a mitre, which other abbees and priors might not do. *Dr. Cowell's Interp. verbo Abbot. Vide 9 Co. Pref. 4.* of the exemption of the abbè of St. Edmundsbury, in Suffolk: and so are hospitals, for if the hospitals be lay, the patron shall visit; 10 *Co.* 31 *a.* and if spiritual, the bishop shall visit, *Co. ibid.* and such ecclesiastical dignities, of which the king or his progenitors have been founders, they are within the visitation of the Lord Chancellor of England only. *Fitz. N. B.* 42 *A.* otherwise the king may make special commissioners to this purpose: *vide in Sir John Davies' R.* 46 *b.* also, if they be a perpetual chauntry, the ordinary hath nothing to meddle or do there. *Sect. 530. Vide 5 Co.* 73 *a.* 9 *Co.* 112 *b.*

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§ 137. But if an abbot, or prior, holds of his lord by a certain divine service, in certain to be done, as to sing a mass every Friday in the week, for the souls, *ut supra*, or every year at such a day to sing a *placebo et dirige*, &c. or to find a chaplain to sing a mass, &c. or to distribute in alms to an hundred poor men an hundred pence at such a day; in this case, if such divine service be not done, the lord may distrain, &c. because the divine service is put in certain by their tenure, which the abbot or prior ought to do. And in this case the lord shall have fealty, &c. as it seemeth. And such tenure shall not be said to be tenure in frank-almoign, but is called tenure by divine service. For in tenure in frank-almoign no mention is made of any manner of service; for none can hold in frank-almoign if there be expressed any manner of certain service that he ought to do, &c.

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Now the Author speaketh also of another tenure, by which abbees, priors, and other spiritual persons, do hold their lands and tenements by certain expressed divine service, and concludeth, that in such

cases, if such divine service be not made accordingly, the lord may distrain, because the divine service is put in certainty, which the abbè or prior shall do, and saith, that for the same cause also, those ecclesiastical men shall do fealty, that is, though no other or more services were reserved, because fealty is incident to every tenure except frank-almoign, as before appeareth; but if rent or other service be also resolved upon the creation of such tenure, then they shall do them all.

Also, it is here said, that such a tenure is not said a tenure in frank-almoign, but is called a tenure by divine service; and *Britton*, cap. 66, numero 5, saith, tenure by divine service certain is a kind of frank-almoign, but not properly; but Littleton saith, that such a tenure is not said a tenure in frank-almoign; no mention is made of any manner of certain service, for none may hold in frank-almoign if any certain service be expressed which he should do.

But if a man do prescribe, that the abbè of B. ought to find a chaplain to do divine service at his chapel within his manor of D. for him and his servants, at certain days in the week, 'tis no rent, neither may he distrain if it be not done accordingly; for this divine service to be done, groweth by prescription, and not by cause of any tenure, and the remedy in this case for the lord of the manor is, by action on the case at the common law; 22 H. 6. [46]; but if the prescription be, that the chaplain should say divine service there for him and his servants, and for his tenants, in this case his remedy is to sue in the court ecclesiastical. 5 Co. 73. *Vide Dr. Cosin's Apology*, part 1. cap. 7.

§ 138. Also, if it be demanded, if tenant in frank-marriage shall do fealty to the donor, or his heirs, before the fourth degree be past, &c. it seemeth that he shall. For he is not like as to this purpose to tenant in frank-almoign; for tenant in frank-almoign by reason of his tenure shall do divine service for his lord, as it is said before; and this he is charged to do by the law of holy church, and therefore he is excused and discharged of fealty; but tenant in frank-marriage shall not do for his tenure such service; and if he doth not fealty, he shall not do any manner of service to his lord, neither spiritual or temporal, which would be inconvenient, and against reason, that a man shall be tenant of an estate of inheritance



to another, and yet the lord shall have no manner of service of him. And so it seems he shall do fealty to his lord before the fourth degree be past. And when he hath done fealty, he hath done all his services.

This case doth shew that which before is touched, viz. that the etymology of words is not always of weight to sway the judgment of law; for although in the case of frank-marriage it faileth, and according is sect. 19; and in this place, and also in sect. 130, the reason and cause wherefore tenant in frank-marriage shall do fealty is declared; therefore the law truly distinguishing (for *ubi lex non distinguit nec nos distinguere debemus*) these cases be well and justly accorded: *Vide Pref. to 9 Co. fo. 8 a*: and the exterior semblance of discordance between our books and other cases, doth arise upon ignorance of the interior intelligence of the said cases, and of the true reason and rule of them; for, for the most part, every particular case is adjudged upon a particular reason. *8 Co. 91 a*. Also, it is to be noted, how the common law doth, in this case, and some other cases, frame their judgments according to the ecclesiastical law, wherewith doth agree sect. 400.

And here by the way may be observed the manner and modesty of Littleton in resolving this question, which also you may find in the precedent section, and in many other places, viz. *il semble que cy*, and so it is commendable in the professors of the law, not peremptorily to give answers to their clients in matters of law, but humbly and modestly to say, "I take the law so to be," or "so it seemeth," or such like words; and in such sort were the ancient Romans used to do even in their judicial proceedings. *Peter Charron's 2d book of Wisdom, fo. 318*.

§ 139. And if an abbot holdeth of his lord in frank-almoign, and the abbot and covent under their common seal alien the same tenements to a secular man in fee simple, in this case the secular man shall do fealty to the lord; because he cannot hold of his lord in frank-almoign. For if the lord should not have fealty of him, he should have no manner of service which should be inconvenient, where he is lord and the tenements be holden of him.

Having before spoken of the purchases made in lands and tenements in frank-almoign, now in this place are shewed two things.

1. That such lands may be also sold and aliened. 2. By what the purchaser or alienee shall hold them, if he be a lay and secular man; and agreeable to the first is sect. 360, where the general rule is, when any man is enfeoffed in lands or tenements, he hath power to alien them to any person by the law: *see in 10 Co. 30 b*, for it is incident: nevertheless such hath been the prudence of the sages of the law, that no sole corporation was at any time trusted with the disposition of his possessions, as to bind his successors; but in such cases he must of necessity have the consents of others, as the bishop of his dean and chapter; the abbot, the consent of his convent *ut hic*; the parson, the consent of the patron and ordinary, *et sic de cæteris*. 10 Co. 60 a: for it should not be reasonable to impose so great charge, or to repose such great confidence in any sole person, or to give power to one only person to prejudice his successors; 3 Co. 75 a; and yet in the case here, the abbè is the sole person to implead and be impleaded, for those lands which he holdeth in the right of his house, and his convent are not to be named. Sect. 655.

But if an abbè do alien without the consent of the convent, this is not void, but shall bind him so long as he doth continue abbè of that house; and if he die, or be removed from thence, yet it is good against his successors, so far forth as that they may not by the law enter upon the feoffee; but their remedy is by action to remove him: Sect. 653: therefore if the alienation, which the abbè shall make of his possession, shall be good and lawful, it is necessary that such alienation be by the consent of the convent, under their common seal, as in this place; and how this may effectually be done in law, *nota* the case in *Sir John Davies' Book, de capitulariter congregatis*, fo. 44 a, et 47 b, et seq. and how ancient the sealing of deeds and instruments hath been in our own nation, you may read in *Co. Pref. to his 3d book, fo. 5 a*, and in *John Selden's Titles of Honor*, 227, that whereas the Saxons' use was, to subscribe charters with names and crosses only, and so deliver them; the Normans changed that form into sealing. *See Lambert's Perambulation, Sic Halling, fo. 318, in my book, in others, fol. 405*; and when any corporation is, they make and use what seal they will. 10 Co. 30 b. *Vide the statute at Carlisle, made anno 35 E.1, et 8 Co. 118 a. Vide hic sect. 102.*

And for the understanding of the second observation in this section, there is a diversity, when lands do pass from the king by his grant, and in his grant no tenure is reserved; or when a clause is added *absque aliquo inde reddendo*, there the law doth create a tenure best for the king; but when the land doth pass from a subject, and the

law for necessity doth change one tenure into another, the law, which is *æquissimus judex*, doth create a tenure so near in freedom unto the first tenure as may be; as if a bishop, or other man of the church, did hold certain lands of the king in frank-almoign, and at the common law had enfeoffed another and his heirs of the same lands, in this case the feoffee shall hold by fealty *tantum*, for this is as near the tenure of frank-almoign as may be, and so it was resolved in Lone's case: 9 Co. 123 b. and the lord in this case meant, is the abbè; for in those ancient times the feoffee did hold of the feoffor, and not of the lord paramount, as now after the statute; and it is observed in 7 Co. 12 a, in *Englefield's case*, as annexed in privity to the blood of the donor, as Littleton saith, where you may read divers like cases proving it.

§ 140. Also, if a man grant at this day to an abbot, or to a prior, lands or tenements in frank-almoign, these words "frank-almoign," are void; for it is ordained by the statute which is called *quia emptores terrarum* (which was made anno 18 E. 1.) that none may alien nor grant lands or tenements in fee simple to hold of himself. So that if a man seised of certain tenements, which he holdeth of his lord by knight's service, and at this day he, &c. granteth by licence the same tenements to an abbot, &c. in frank-almoign, the abbot shall hold immediately the tenements by knight's service of the same lord of whom his grantor held, and shall not hold of his grantor in frank-almoign, by reason of the same statute. So that none can hold in frank-almoign, unless it be by title of prescription, or by force of a grant made to any of his predecessors before the same statute was made. But the king may give lands or tenements in fee simple to hold in frank-almoign, or by other services; for he is out of the case of that statute.

Before is [written] of frank-almoign, but now the law is altered in that case by the statute Westm. 3. made 18 E. 1., and the causes, moving them to alter the common law in this point, doth appear by the preamble of the said statute; and you may perceive, that it was not only made against feoffments in frank-almoign, but for a ge-

neral law in all cases. And here is occasion to speak of the third tenure, whereby abbots or other ecclesiastical persons may hold lands or tenements; for here it is said, if at this day, after the said statute, a man hold lands by knight's service, or in socage, and thereof do enfeof an abbot, &c. by licence, they shall hold the lands of the lord paramount by such temporal service as the feoffor did.

And here note also, that before this statute *quia emptores terrarum*, another was made against alienations in mortmain, *Statutum de religiosis*, 7 E. 1. et vide 27 H. 8. cap. 10; and Dr. Ridley, 150, et seq.: and therefore lands in fee simple might not be given to ecclesiastical persons, but by special licence of the king, nor yet may at this day be done. Vide 10 Co. 31 a. But the king, being not named by any of those statutes, is not bound by them. Vide Fitz. N. B. 251 I. for Frowicke doth set it down for a rule, 12 H. 7. 21. that when the king had interest by the order of the common law, in such case if a statute be made general, which taketh away that liberty from all, yet the king and his liberty is not taken away, unless he be specially named in the act. Plowd. 240 a. accordant. But in special cases the king shall be bound by acts of parliament, though he be not therein specially named, which you may see, in 5 Co. 14 b.

§ 141. And note, that none may hold lands or tenements in frank-almoign, but of the grantor, or of his heirs. And therefore it is said, that if there be lord mesne and tenant, and the tenant is an abbot, which holdeth of his mesne in frank-almoign, if the mesne die without heir, the mesnalty shall come by escheat to the said lord paramount, and the abbot shall then hold immediately of him by fealty only, and shall do to him fealty; because he cannot hold of him in frank-almoign, &c.

In this place and before in this chapter is declared, that the tenure in frank-almoign is annexed in privity unto the blood of the donor, and thereupon the case was 35 H. 6. fo. 56, the Templars did hold divers of their possessions in frank-almoign, and after they were dissolved; and by parliament anno 17 E. 2. their possessions

were given to the hospitallers, to hold them in the same manner as the Templars did hold, yet they by those general words did not hold in frank-almoign, because the privity of the tenure on the part of the tenant doth not continue; and this privity being personal, and inseparable, by general words of the act shall not be transferred to the hospitallers. 3 Co. fo. 3b. 7 Co. 13a. *Englefield's case*.

If at this day, or after the statute *quia emptores terrarum*, there be lord, mesne, and tenant, and the tenant is an abbè, and who doth hold of his mesne in frank-almoign, and if the mesne do die without heir, then the mesnalty shall come to the lord paramount by escheat, and the abbè, &c. shall then hold of him immediately by such services as the mesne did hold of him, and not by fealty only, nor in frank-almoign. In *Dyer*, fo. 45a, this case in frank-almoign is compared to the tenure *in capite*, which is inseparable, and cannot be of any other, but only of the person of the king.

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§ 142. And note, that where such a man of religion holds his tenements of his lord in frank-almoign, his lord is bound by the law to acquit him of every manner of service which any lord paramount will have or demand of him for the same tenements: and if he doth not acquit him, but suffereth him to be distrained, &c. he shall have against his lord a writ of mesne, and shall recover against him his damages and costs of suit, &c.

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In this place is shewed, that the grantor in frank-almoign is bound to acquit the donee [by] the word "frank-almoign;" and see in *Fitz. N. B.* 136B, that a man may have acquittal, and sue a writ of mesne upon it, in divers ways, besides in this case of frank-almoign; by 7 E. 2. *Garranty*, in *Fitz.* 79, the donor and his heirs, in this case of frank-almoign, are bound to warranty also; and what is acquittal, and what is warranty, you may see by the subsequent sections 143, 144. *Vide sect.* 135. and see this case quoted and applied in *Plowd.* 305b.

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LIB. II. CAP. VII.—*HOMAGE ANCESTREL*.

§ 143. Tenant by homage ancestrel is, where a tenant holdeth his land of his lord by homage, and the same tenant and his ancestors, whose heir he is, have holden the same land of the same lord and of his ancestors, whose heir the lord is, time out of memory of man, by homage, and have done to them homage. And this is called "homage ancestrel," by reason of the continuance, which hath been, by title of prescription, in the tenancy in the blood of the tenant, and also in the seignory in the blood of the lord. And such service of homage ancestrel draweth to it warranty, that is to say, that the lord, which is living and hath received the homage of such tenant ought to warrant his tenant, when he is impleaded of the land holden of him by homage ancestrel.

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This tenure, as appeareth, is a special tenure by homage, and groweth by prescription, because of the continuance, which hath been from time whereof no memory is to the contrary, in that tenancy in the blood of the tenant, and also in the seignory in the blood of the lord, without any alteration of the part of the lord of his seignory, or of the tenant of his tenancy; for homage ancestrel is inseparable, as the case of the wardship of the eldest son, which the law of nature doth give to the father is, inseparable: *See the application of these cases in 7 Co. 12b, 13a. Englefield's case, of conditions which be personal and inseparable.*

But I suppose there is not much land at this day of that nature, or that hath so long continued without alteration for one while; nothing is more inconstant than the estate which we have in lands and livings, if at the least that may be called an estate, which never standeth. *Lambert's Perambulation, 9; et tempora mutantur et nos mutamur in illis.*

The consequence of this tenure and prescription is, that the lord ought, and is compellable by law, to warrant the tenancy to his tenant against all men, when the tenant is impleaded for the same; as if by deed, and by express words, the lord were bound so to warrant and acquit him. *45 E. 3. 23a.*

§ 144. And also such service by homage ancestrel draweth to it acquittal, *scil.* that the lord ought to acquit the tenant against all other lords paramount him of every manner of service.

You see he doth acquit all, as another consequent to this tenure distinctly, which also is warranted to be law by the book, 45 E. 3. 23. before mentioned.

And although commonly you shall find in deeds and writings these two words *warrantizabimus et acquittabimus* placed together, as *synonima*, yet they have not one and the same signification in law, as here in *sect.* 733. you may perceive.

§ 145. And it is said, that if such tenant be impleaded by a *præcipe quod reddat*, &c. and vouch to warranty his lord, who cometh in by process, and demands of the tenant what he hath to bind him to warranty, and he sheweth, how he and his ancestors, whose heir he is, have holden their land of the vouchee and of his ancestors time out of mind of man; and if the lord, which is vouched, hath not received homage of the tenant, nor of any of his ancestors, the lord (if he will) may disclaim in the seignory, and so oust the tenant of his warranty. But if the lord, who is vouched, hath received homage of the tenant, or of any of his ancestors, then he shall not disclaim, but he is bound by the law to warrant the tenant; and then if the tenant loseth his land in default of the vouchee, he shall recover in value against the vouchee of the lands and tenements, which the vouchee had at the time of the voucher, or any time after.

In this place is shewed the means and manner, how the tenant shall come to have benefit of this warranty, *viz.* by voucher, and how the lord in that case shall demesne himself.

*Nota*, before the tenant can vouch, he must be impleaded, so the voucher doth depend upon an act precedent, that is, he must be impleaded in a real action by a stranger; 1 Co. 112b; see there the consequence.

And it is shewed, that if a real action, here named a *præcipe quod reddat*, be brought against the tenant, he must vouch his lord. 24 E. 3. 35. *per Wilby, accordat.*

Yet the tenant may, for saving of his warranty, and to prevent future events, have his *warrantia chartæ*, though no action be commenced against him, though his warranty be by prescription, and not by charter, and though the form of this writ is *quod juste ete warrantizet B. unum messuagium in D. &c. unde carta habet*, yet it will lie in the case of tenure by homage ancestrel. *Fitz. N. B. 134 F. 8 Co. 48 b. et vide F. N. B. 135 F.*

And if the tenant be impleaded in such an action, as that therein he cannot vouch by the law, as assize, writ of entry in nature of assize, or in a *scire facias* upon a fine, then in these cases his only remedy is by this writ of *warrantia chartæ*, as in *Fitz. N. B.* in the place last mentioned you may read.

Then the lord being vouched may demand of the tenant the line, *viz.* what he hath to bind him to warranty, and thereupon the tenant must shew his title, as in this case he doth by tenure by homage ancestrel, which the lord may counterplea, and refuse to enter into the warranty, if he will, and allege, that howsoever the tenure is by homage ancestrel, yet because this lord hath not had homage done unto himself by the voucher, nor any his ancestors, he may disclaim in the seignory from henceforth, and so save himself from the warranty, if peradventure he find himself not able to defend the land against the title of the plaintiff.

But what if the lord, upon such pretence, wilfully do refuse to accept homage, when the tenant doth offer to do it to him; in such case the tenant, for his indemnity, may compel him to accept his homage, by a writ called *homagio capiendo*. 24 E. 3. 23. it is agreed, a man shall not be compelled to take homage by a writ *de homagio capiendo*, but where he doth hold by homage ancestrel, where the lord by the taking of it shall be bound to warranty and acquittal, *et ex hoc videtur*, that the tenant cannot bind the heir of the lord in regard of the homage taken by the ancestor; but he may thereof disclaim in the seignory, except the heir himself had received homage also, *et cum hoc concordat Littleton hic*, that the tenant must do homage again in such a special case, *ut videtur per implicationem, et aliter* he cannot bind the lord to warranty or acquittal; but *videtur ibidem*, that if the tenant do homage to the father, who dieth, he shall not be compelled to do homage to the son of the father, but for the advantage of the warranty and ac-



quittal, he may restrain the lord to take homage of him, *per breve de homagio capiendo*. *Bro. tit. Fealty*, 4.

And note the difference, when the lord disclaim in the seignory, and when the tenant doth disclaim in his tenancy; for if the lord doth disclaim *ut hic*, although the lord doth hereby lose his seignory, yet the tenant doth gain nothing, but peradventure he may lose his tenancy, for warranty, which the new lord paramount is not bound to do, as his immediate lord that did disclaim was to do; but where tenant doth disclaim, there the lord may enter, and gain the fee simple of the tenancy. 13 *II.* 7. 27*b.* by *Keble*, fo. 28.

In the conclusion of this section is shewed the fruit and effect of this voucher, when the vouchee doth enter into the warranty, and hath nothing to counterplea the voucher; *viz.* if the tenant do lose his lands in default of the vouchee, (for after the vouchee hath entered into the warranty, he is tenant in law to the demandant, *sect.* 491.) then the tenant or voucher shall recover against the vouchee, of the lands and tenements which the vouchee had at the time of the voucher, or at any time after. *Vide Fitz. N. B.* 134*K.*

So here must be observed, that if, after the voucher, the vouchee do sell and convey part of his lands to one man and part to another, that all the feoffees must rateably yield to the voucher in value; 3 *Co.* 14*a.* where the law is declared, that when lands shall be charged by any bond, the charge ought to be equal, and one person shall not alone bear the burthen.

But in bonds personal otherwise it is, as if two be bound in an obligation, and one of the obligors dieth, there the charge [shall survive] and doth accord 12 *H.* 7. 3*b.* And in this place it is to be observed, that the tenant by his voucher shall recover against the vouchee according to the value that his tenancy was worth at the time of the voucher, and not according to any other value to which it is afterwards improved by any new mine found, or other mould, or husbandry. 6 *E.* 2. *Voucher*, *Fitz.* 258.

Also it is markable, that in some special cases by the operation of law only, warranty is made without expressing any clause of warranty; as namely, in this case of homage ancestrel, and in the tenure by frank-almoign, as in the precedent chapter may appear, so also in exchanges. *Fitz. N. B.* 135*B.* and hereof read more in 4 *Co.* 121.

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§ 146. And it is to be understood, that in every case where the lord may disclaim in his seignory by the law, and of this he will disclaim in a court of record, his seignory is extinct, and the tenant shall hold of the lord next paramount to the lord which so disclaimeth. But if an abbot or prior be vouched by force of homage ancestrel, &c. albeit that he never took homage, &c. yet he cannot disclaim in this case, nor in any other case; for they cannot take away or divest a thing in fee, which hath been vested in their house.

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In this place is shewed, that if the lord do disclaim, he doth from thenceforth lose his seignory, which is his inheritance therein, from him and his heirs; but such disclaimer must be in court of record; for the law doth not regard any verbal disclaimer in the country in this case; for [of] frank-tenement or inheritance which is vested any man may not be divested so ligerly, as by bare words in the country, *sect. 695, according; and 3 Co. 26, non librum*. And so you read *sect. 185*. that if a man will become a villein to another man, it sufficeth not that he do so confess himself in the country, but he must come into a court of record, and there confess himself to be a villein to that man; and what court is a competent court wherein disclaimer may be, and what not, *vide Plowd. 208, and Dyer, 236, and 6 Co. 19b. et vide 16 H. 7. fo. 4 et 5. Disclaimer in Chancery*.

Also, by the sequel of this case you see, as in divers others, that *nulla est regula quin fallit*; for if an abbot or prior be lord, and be vouched by force of homage ancestrel, although he did never himself take homage, yet he may not disclaim; for they may not put away or divest any fee simple, which hath been vested in their house, or monastery; for disclaimer is not sufferable in prejudice of another, as if a husband will disclaim the right of his wife, the disclaimer is not sufferable, for it should be damage unto the wife; the same law is of an abbot, for it is to the damage of his house, and so of disclaimer made by an infant within age. *36 H. 6. fo. ultimo*.

But upon special matter shewed, that the descending of the land should be prejudicial to them, then an abbè or bishop may disclaim, *43 Ass. pl. 23. Vide Bro. Disclaimer, 47; and Doct. & Stud. li. 2. cap. 33 et 34*.

If lord, mesne, and tenant by frank-almoign, the mesne releaseth to the abbè, if this release be good, it doth prejudice the abbè,

for he must hold of the lord, and so that acquittal and warranty is good.

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§ 147. Also, if a man, which holds his land by homage ancestrel, alien to another in fee, the alienee shall do homage to his lord: but he holdeth not of his lord by homage ancestrel; because the tenancy was not continued in the blood of the ancestors of the alienee; neither shall the alienee have warranty of the land of his lord; because the continuance of the tenancy in the tenant and to his blood by the alienation is discontinued. And so sec, that if the tenant which holdeth his land of his lord by homage ancestrel alieneth in fee, though he taketh an estate again of the alienee in fee, yet he holds the land by homage, but not by homage ancestrel.

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In this is particularly shewed, which before is generally declared, *viz.* that homage ancestrel is by prescription in the blood of the lord, and the blood of the tenant, which prescription must have continuance without any interruption; and it is here said, if the tenant by homage ancestrel do alien in fee, although he do take again the same estate from the alienee, yet he shall hold the land by homage, but not by homage ancestrel. 8 Co. 75b. *Sir John Davies' R. 3b.* for *consuetudo semel reprobata non potest amplius induci*, for as continuance doth make custom, so discontinuance doth destroy it; *nihil tam conveniens est naturali equitati, quam unumquodque dissolvi, eo ligamine quo ligatum est.* *Sir John Davies' R. 33b.* And to this tenure by homage ancestrel, warranty and acquittal are incident; but if either the tenant do alien his tenancy, or the lord his seignory, the tenure is gone as aforesaid, and therefore in case, where the lord doth grant his seignory, the tenant is not compellable to attorn, unless the grantee will save to him his warranty. *Finch's Book, lib. 2. fo. 48b.* according. *Vide sect. 229. in fine.*

If tenant in frank-almoign, or tenant by homage ancestrel, do vouch the donor, and he cannot bar the demandant, the lands recovered in value shall not be of the former tenure, but otherwise it is in case of frank-marriage; and in 8 Co. 75b this case, and especially the last part thereof, is remembered, and applied and exemplified by another case there worthy the reading and observation.

§ 148. Also, it is said, that if a man holds his land of his lord by homage and fealty, and he hath done homage and fealty to his lord, and the lord hath issue a son, and dies, and the seignory descendeth to the son; in this case the tenant, which did homage to the father, shall not do homage to the son; because that when a tenant hath once done homage to his lord, he is excused for term of his life to do homage to any other heir of the lord. But yet he shall do fealty to the son and heir of the lord, although he did fealty to his father.

Here is shewed, that a tenant shall not be compelled to do homage, but once during his life; so that if the lord, that hath received homage, die, leaving the tenant, the tenant is excused during his life to make homage unto any other heir of the lord.

But it must be remembered, which before is said, that in case of homage ancestrel, the tenant must do it again to the heirs, for his own benefit, and to save his warranty and acquittal.

§ 149. Also, if the lord, after the homage done unto him by the tenant, grant the service of his tenant by deed to another in fee, and the tenant attorneth, &c. the tenant shall not be compelled to do homage. But he shall do fealty, although he did fealty before to the grantor: for fealty is incident to every attornment of the tenant, when the seignory is granted. But if any man be seised of a manor, and another holds of him the land, as of the manor aforesaid by homage, which tenant hath done homage to his lord who is seised of the manor, if afterwards a stranger bringeth a *præcipe quod reddat* against the lord of the manor, and recovereth the manor against him, and sues execution; in this case the tenant shall again do homage to him, which recovereth the manor, although he had done homage before; because the estate of him, which received the first homage, is defeated by the recovery, and it shall not lie in the power of the tenant to falsify or defeat the recovery which was against his lord. And so see a diversity in this case, where a man cometh to a seignory by recovery, and where he cometh to the same by descent or grant.

As the tenant, after homage once done to his lord, is not compellable to do homage to any heir of the lord, so is he also freed against the alienee of the seignory.

But if the case be put on the other side, viz. that the tenant, after he hath done homage, dieth, or alieneth his tenancy, in this case the heir, or his assignee, shall also do homage unto the same lord; and so note the difference, that one lord may have divers homages done to him for one land by his several tenants, but the tenant, that hath once done his homage, shall not be compelled to do his homage again during his life, notwithstanding any alteration of the seignory by descent or by alienation.

And I have heard this very case, which Littleton putteth, doubted of, viz. if the lord grant in seignory, in case aforesaid, and the tenant do attorn generally, he is compelled to do his homage again to the alienee, because he did not attorn specially, viz. saving his advantage. *Ideo quære, vide sect. 229. in fine.*

And so they say, if lord, mesne, and tenant be, and the tenant do forejudge the mesne in a writ of mesne, the tenant shall do homage again unto the lord paramount, because this forejudger was his own act, for the process in a writ of mesne by the common law is distress infinite in the same county; but forejudger is by statute, which the tenant needed to have prosecuted at his pleasure. *Fitz. N. B. 137 A.*

But the conclusion of this section is certain, viz. that if the lord have received homage of the tenant, and after a recovery is had against the lord of the manor, and execution, in this case the tenant is compellable again to do homage to him that hath recovered, because the state of him, to whom the tenant had done homage, is by the recovery avoided by a lawful and elder title, as by the law is presumed; as if it be otherwise, yet it lieth not in the mouth of the tenant to falsify, or defeat the recovery, which was had against his then lord, because he was not party to it, but a stranger to the said recovery.

And in this first case of recovery, and falsifying recoveries, which yet I have met with in this book, the credit was great which the common law did give unto recoveries, presuming they were always upon true and unfeigned titles: *Plowd. 43 b.* but now they are used as conveyances, and for assurances to be made by consent of both parties, and oftentimes to dock an estate tail, the perfect cognizance whereof must be diligently searched for; but because it doth not appertain to this present matter, I do omit further to write thereof at this present time.

§ 150. Also, if a tenant, which ought by his tenure to do his lord homage, cometh to his lord, and saith unto him, "Sir, I ought to do homage unto you for the tenements which I hold of you, and I am here ready to do homage to you for the same tenements; and therefore I pray you that you would now receive the same from me."

§ 151. And if the lord shall then refuse to receive this, then after such refusal the lord cannot distrain the tenant for the homage behind, before the lord requireth the tenant to do homage unto him, and the tenant refuse to do it.

Here must we understand, that when homage or fealty is to be done to the lord, the tenant is to do the first act, viz. to tender, and to offer to do, his corporal service, and the lord is not first to require or demand it; order requireth that the inferior should attend his superior, and by common intendment the lord is superior, and the tenant inferior.

Note, in avowry for homage it sufficeth not the tenant to be ready to do his homage in court of record, if he did not offer to do it in the country, for thereupon the lord shall have return, otherwise it is in customs and services. *Tr. 7 E. 3. pl. 19.*

The tenant is bound always by the law to know, and to take notice, what service and things be behind of his land, as rent, homage, or amercement. *Pasc. 45 E. 3. 9 a. per Fynch.*

It is in this place indefinitely shewed, that the tender of homage was made unto the lord, for it is a corporal service to be done unto the person of the lord, and to no other; but fealty may be taken or tendered to the steward, attorney, or bailiff, of the lord, as before is declared in the chapter of Fealty.

But homage and fealty, being personal service, was not to be done by a deputy, but by the person of the tenant himself. *21 E. 3. 17 a.* Note the diversity.

But *nota* in *9 Co. 76 a.* he, to whose use a surrender is made, may be admitted by attorney; for though he, who is to be admitted, is to do fealty, which none can do but he that is admitted, and therefore in this case the lord may refuse to admit him by attorney, yet if he do admit him by attorney, it is good enough. *Combes's case.*

Also, this tender of homage and fealty may as well be done to the lord out of the manor, in any other place where the lord is personally, and in the manor. *Pasc. 21 E. 3. 11 b.*

And after the tenant hath once lawfully tendered his homage or fealty to the lord, the lord may not distrain his tenant for that service, before he have demanded or required his tenant to make unto him homage, and he do refuse it, as by the said book last recited appeareth. 20 E. 3. *Avowry*, 123. *See of fealty*, 21 E. 4. 16. And if the lord do distrain after tender, without request, the tenant, in his replevin, shall not need to say, *uncore prist*, because the distress was tortious. 4 E. 3. *T. M. pl.* 48. *Vide Ibidem. pl.* 6. 21 E. 4. 17 a.

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§ 152. Also, a man may hold his land by homage ancestrel; and by escuage, or by other knight's service, as well as he may hold his land by homage ancestrel in socage.

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Also, a man may hold by homage ancestrel, and by escuage, or by any other knight's service, as well as by homage ancestrel in socage; and here by the way is proved, which before is said in the title of Homage, that homage by itself doth not make knight's service. *See sect. hic* 117.

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## LIB. II. CAP. VIII.—GRAND SERJEANTY.

§ 153. Tenure by grand serjeanty is, where a man holds his lands or tenements of our sovereign lord the king, by such services as he ought to do in his proper person to the king, as to carry the banner of the king, or his lance, or to lead his army, or to be his marshal, or to carry his sword before him at his coronation, or to be his sewer at his coronation, or his carver, or his butler, or to be one of his chamberlains of the receipt of his exchequer, or to do other like services, &c. And the cause why this service is called grand serjeanty is, for that it is a greater and more worthy service than the service in the tenure of escuage. For he which holdeth by escuage, is not limited by his tenure to do any more especial service than any other which holdeth by escuage ought to do, but

he which holdeth by grand serjeanty ought to do some special service to the king, which he that holds by escuage ought not to do.

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Before I enter into the special discourse of things in this chapter, it must be known, that the coronation of the king is but a royal ornament, or solemnization of the royal descent, no part of the title. 7 Co. 10 b.

Also, we see that the law, which always loveth decorum, doth require, that those men, which shall attend the king, be eminent and of honor, who by their knowledge and experience have science to serve the king in honor and state, and hereof read in *Plowd.* 456.

In this place, and by all the chapter, it is declared, that this tenure *per serjeantiam* is only of the king, and may not be holden of any other person.

Also, here is taught (as also sect. 155) that this service of grand serjeanty is to be done within the realm, as at his coronation, &c., to bear his sword before him, or to be his sewer, or his carver, or his butler, or to be one of his chamberlains of the receipt of his exchequer, &c.

Also, this service may be done, if the reservation be so upon the first creation of the tenure, or to have the conduct or leading of his host, or to be his marshal, but, such warlike services are for the most part to be done within the realm, as it is said sect. 155, and in sect. 157 the words are, *ad inveniendum unum hominem ad guerram ubicunque infra quatuor maria.*

Also, as this is one of the tenures by knight's service, so it is the greatest and most honorable, and therefore hath that name or title of grand serjeanty, or great service, for homage; fealty, escuage, &c. are services by which lands and tenements are holden, as is read in sect. 226. But of all other this by grand serjeanty is the greatest and most highest, and is a tenure of the king by knight's service *in capite*, because it is made unto the chiefest body of this realm, and may not be holden of any other but of the king; for tenures *in capite* did commence in ancient times by the king's grants to defend his person and crown and regalty against enemies and rebels: *Dyer*, 44 a. and because this tenure must be immediately of the king, therefore it may have no other original commencement or creation but from the king, and not from any subject; and therefore if the prince, before the statute *quia emptores terrarum*, had



made a seignory of his person, and after he is become king, this was, nor is, no tenure *in capite*; also if lord mesne holdeth of the king *in capite*, and after the mesne dieth without heir, or is attainted of felony, &c. or dieth, and the king is heir unto him, or the king doth purchase the mesnalty, so that the tenant must of very force hold of the king, yet for all this the tenant shall not hold of him *in capite*; for this tenure, by which now he holdeth, is divided from the crown, but by a mesne; yet the seignory which was between the mesne and the king is extinct, and the mesnalty is come in lieu thereof; for it is no reason that the tenant paravail should be prejudiced in his tenure by the act or treason of his lord, but if default be in the tenant himself, otherwise it is, as if he do force his mesne, or do obtain a recovery against the mesne *et similia*.

Note also, that the king by no way may grant or sever the tenure and seignory *in capite* from his crown, for no subject may receive or take it by his grant with such prerogative. *Dyer*, 30 II. 8. 44. read all the case.

And therefore, if the king do make release unto the tenant *in capite*, to hold by a penny, and not *in capite*, this is a void release; for this tenure is incident unto the person and crown of the king, and hath prerogative that it cannot be holden of any subject; for if the king at this day do make a gift in tail, to hold of him *in capite*, and after he will grant the reversion of this land to another in fee, the tenure nor service do not pass unto the grantee, but doth remain to the king, as the tenant in frank-almoign can hold of none but of the donor and of his person: *Ibid.* and hereof read more in *John Selden*, 266, in *his Titles of Honor*, where briefly he saith, that a tenure of the crown or in chief, is when its of the king, as he is king, and personal; but of the king only, is when its of him by reason of some seignory escheated, or by some other means, come to his hands as inheritance, or such like; and in *Dyer*, 285, and in *Keilw.* 171, 6 II. 8. where is declared, that the tenure to be constable of England, which the Duke of Buckingham did claim, was a tenure by grand serjeanty, and so was the case 18 *Ass. placito ultimo*, of the barony and earldom of Westmorland, then in the hands of Robert Lord Clifford, as you may read at large in 2 *Co.* 80; for regularly all baronies are holden *in capite*, and by great serjeanty, not only those in temporal lands, but those also which the bishops possess; *Stamf. Prerog. fo. 8 a*; in which book and first chapter, as also in the third, you may plainly read what are the consequences of this tenure, and wherein it differeth from

the tenure of the king only by knight's service general, viz. in the having prerogative in the wardship of the lands, which to the ward doth descend, that are also holden of other lords, and in the case of primer seisin, and for licence to make alienations.

And in *Crompton's Courts*, in the title of *the Court of High Steward, and Marshal of England*, you may read many precedents of special claims made to divers offices, and services of serjeanty, to be performed at the king's coronation, done in the coronation of Edward 3. and King Henry 4. which to read is worthy the labour.

§ 154. Also, if a tenant which holds by escuage dieth, his heir being of full age, if he holdeth by one knight's fee, the heir shall pay but 100s. for relief, as is ordained by the statute of *Magna Charta*, c. 2. But if he which holdeth of the king by grand serjeanty, dieth, his heir being of full age, the heir shall pay to the king for relief one year's value of the lands or tenements which he holdeth of the king by grand serjeanty, over and besides all charges and reprises. And it is to be understood, that *serjeantia* in Latin is the same *quod servitium*, and so *magna serjeantia* is the same *quod magnum servitium*.

As this tenure by grand serjeanty is the most highest service that any subject may do to the king in knight's service, so the relief, which is incident to this special tenure, and which is due to the king, when such a tenant dieth, his heir being of full age, is greater, and differeth much from that relief which is incident to any other service of chivalry, as plainly appeareth.

So have you learned three divers manners of relief, according to the diversity of the tenures, viz. when tenant in socage dieth, his heir being past his age of fourteen years, he shall then pay for his relief the double of that rent, which upon that tenure was reserved, if any rent in that case was reserved: sect. 126, 127; and the relief which the heir in chivalry, being of the age of twenty-one years at the death of his ancestor, shall pay, is always the fourth part of the value of the lands, as by *Magna Charta*, cap. 2. doth appear. But the relief for the heir by grand serjeanty in like case,

is the whole value of that land for one year, deducting the charges and reprises.

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§ 155. Also, they, which hold by escuage, ought to do their service out of the realm; but they, which hold by grand serjeanty, for the most part ought to do their services within the realm.

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This section is explained before in the chapter of Escuage; and by this it seemeth that Littleton's opinion was, that Scotland was another realm than England, and so was Wales before the conquest thereof, although it be of the continent with England, and not divided by sea, and so is the opinion of Saunders, in the case of *Stowell and Zouch*, in *Plowd.* 368 *b.* that if a fine be levied of lands by a disseisor, the disseisee being at this time in Scotland, he shall have five years to claim, or otherwise to reverse the fine, after his return from the realm of Scotland, *quia Scotland est extra regnum Angliæ*, by the exception of the statute 4 *H.* 7. 24. *Vide sect.* 95, *hic.*

And so is the law at this day, though the king do possess both the kingdoms, and by a writ of *ne exeat regno* any subject may be restrained from going out of the realm of England into the realm of Ireland, or of Scotland. *Crompton's Courts*, 64. 7 *Co. in Calvin's case.* But Ireland is a member of England. *Sir John Davies*, 25 *b.* *Et vide in* 7 *Co.* 22 *b.* 23 *a.*

Also, in this section we see, that which in the beginning of this chapter is shewed, viz. that this tenure by grand serjeanty may be as well to do certain domestical services to the king within the realm, as foreign services in war, or bellical, according as in the first donation the king hath reserved. *See in* 7 *Co.* 15 *b.* that though the king be in a foreign kingdom, yet he is judged in law a king there.

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§ 156. Also, it is said, that in the marches of Scotland some hold of the king by cornage, that is to say, to wind a horn, to give men of the country warning, when they hear that the Scots or other enemies are come or will enter into England; which service is grand serjeanty. But if any tenant hold of any other lord, than of the king, by such service of cornage, this is not grand serjeanty, but it is knight's service, and it draweth to it ward and marriage, for none may hold by grand serjeanty but of the king only.

This tenure of cornage of the king is also grand serjeanty, and so you may read it in *Cowell's Interpreter, verbo Chivalrie*.

§ 157. Also a man may see in *anno* 11 H. 4. that Cokayne, then Chief Baron of the Exchequer, came into the Common Place, and brought with him the copy of a record in these words. *Talis tenet tantam terram de domino rege per serjeantiam, ad inveniendum unum hominem ad guerram ubicunque infra quatuor maria, &c.* And he demanded; if this were grand serjeanty, or petit serjeanty. And Hanke then said, that it was grand serjeanty; because he had a service to do by the body of a man, and if he cannot find a man to do the service for him, he himself ought to do it. *Quod alii justiciarii concesserunt.* Then saith Cokayne, "Ought the tenant in this case to pay relief to the value of the land by the year?" *Ad quod non fuit responsum.*

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This place doth explain one thing, which by the words in the first section of this chapter might be conceived, viz. that the great and personal service may be done by a sufficient deputy, if the tenant be not in case to perform it; even as before is said of that service in the tenure of escuage; for lands of this tenure by grand serjeanty may as well come into the hands of a woman, or spiritual and regular person, or the tenant when the service is to be done may be afflicted with diseases.

The case hereunto vouched is to be read in 11 H. 4. fo. 72, and agreeable thereunto is 24 E. 3. tit. *Tenure*, in Brooke, 19, that he that holdeth of the king by service to find a man to serve in the wars by forty days at his own costs, this is grand serjeanty.

But a tenure *inveniendum unum equum* or such like, is but petit serjeanty, for this is corporal service. *Tenures*, 69, Brooke. *Guard.* in Fitz. 145.

And here by the way, out of this dialogue between the Lord Chief Baron and the Justice of the Common Place, is to be observed, that they in the Exchequer must resort in matters of doubt for their resolutions touching matters of the common law, to the justice of the common law, and contrarily, the Judges of the law must be

directed by the Court of Exchequer concerning matters of account, touching any of the king's revenues; for every of the four ancient courts at Westminster have their particular cognizance and practice in such things which are appropriated to them; and therefore, as the Chief Baron did content himself with the answer of the Justice of the Common Place, touching the tenure, so when the Chief Baron did declare the course of the Exchequer, concerning that relief which the tenant by grand serjeanty ought to pay, the said Justices seemed to be also agreed thereunto by their silence, for so the words are, viz. *ad quod non fuit responsum. Plowd. 320 b. et sect. 125, and qui tacite consentire videtur.*

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§ 158. And note, that all which hold of the king by grand serjeanty, hold of the king by knight's service; and the king for this shall have ward, marriage, and relief; but he shall not have of them escuage, unless they hold of him by escuage.

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In this conclusion he expresseth in plain terms, that this tenure by grand serjeanty is a tenure of the king by knight's service, and the king shall have all incidents to that tenure; but escuage must be specially reserved as before, in the title of Escuage is declared, otherwise the king shall not have escuage of his tenant, no more than other lords.

And agreeable to this, Fyneux, Chief Justice, saith, that grand serjeanty is very service of chivalry, and no diversity between them, save in the relief; *quod fuit concessum. Keilw. 171 b.*

But yet note, it is very knight's service, and therefore doth draw to it gard, marriage, and relief, so it is the highest in its nature, and greater than that other knight's service, though of the king, and it is *in capite*, and so is not every knight's service of the king; and in regard thereof many prerogatives do appertain to it, more than in the common tenure by knight's service of the king, as before is declared, which *nota*.

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## LIB. II. CAP. IX.—PETIT SERJEANTY.

§ 159. Tenure by petit serjeanty is, where a man holds his land of our sovereign lord the king, to yield to him yearly a bow, or a

sword, or a dagger, or a knife, or a lance, or a pair of gloves of mail, or a pair of gilt spurs, or an arrow, or divers arrows, or to yield such other small things belonging to war.

This is markable, that such petit things as are payable unto the king, proving a tenure by petit serjeanty, must be things appertaining to the furnishing of the king in his wars; if the tenant by his tenure be to pay money, it is petit serjeanty, and not common socage; for *thesaurus regis est pacis vinculum et bellorum nervi*. 3 Co. 12 b.

But though it be in this place said, that these petit things, appertaining to the wars, must be paid yearly, yet it seemeth that it is not necessary; for thus it is read in other books, viz. *nota*, if a man hold of the king to find him a horse price 5*s.*, *et unam saccam et unam brothiam* by forty days, when the king doth go in wars into Wales, this is petit serjeanty, and the king shall not have wardship by this tenure. *Adjudged* 9 H. 3. *Guard*, 145, *Fitz.*

§ 160. And such service is but socage in effect; because that such tenant by his tenure ought not to go, nor do any thing in his proper person, touching the war, but to render and pay yearly certain things to the king, as a man ought to pay a rent.

It is here said, that tenure by petit serjeanty is but socage in effect, which is true in regard that such tenure doth not draw ward, marriage, &c.; nevertheless petit serjeanty is of a higher nature in some respects, than is common socage holden of the king; for it is a tenure of the king and of his crown of a seignory in gross, and therefore it is socage *in capite* of the king; for so we must know that [as there] is a tenure *in capite* of the king by knight's service, so there is also a tenure *in capite* of the king in socage.

If the king give lands to hold of him by fealty, *et pro omnibus servitiis*, this is socage *in capite*, for it is of the person of the king; but otherwise it is, if it be *tenendum de manerio suo de B.* *Nota* diversity. *Bro. Tenures*, 94.

The consequences of this tenure of the king in socage *in capite* are, to pay primer seisin by the statute of *prerogativa regis*, cap. 3, the words being general, *rex habebit primam seisinam post mortem*

*eorum qui de eo tenent in capite*, by which the tenure in socage *in capite* is no less included than the other tenure (1) *in capite* in chivalry. *Vide Stamf. Prerog. cap. 3.*

But the king shall have so great, or so long prerogative in the one as in the other. 38 *H. 8. Livery. Bro. 60*; *et Stamf. Prerog. 13 b.*

The words of the statute of *prerogativa regis* are, moreover, *cujuscunque ætatis hæredes ipsorum fuerint*, so if the heir were within age at the death of his ancestor, the king shall have primer seisin, and the heir driven to sue his livery, notwithstanding the king hath also had his wardship of him; and so it hath been ever used, saving, that where he hath been in ward, he payeth but one half year's profit for primer seisin, and in the other case he payeth the whole, or all; of which matter read *Stamf. Prerog. cap. 3.* One other consequence of this tenure in socage *in capite* is, that he cannot alien any part thereof without licence, &c. yet the statute of Prerogative, cap. 7, touching alienations, speaketh only of knight's service; but the law is so taken (2). *Read Stamford upon that chapter.*

§ 161. And note, that a man cannot hold by grand serjeanty, nor by petit serjeanty, but of the king, &c.

## LIB. II. CAP. X.—TENURE IN BURGAGE.

§ 162. Tenure in burgage is, where an ancient borough is, of which the king is lord, and they that have tenements within the borough, hold of the king their tenements; that every tenant for his tenement ought to pay to the king a certain rent by the year, &c. And such tenure is but tenure in socage.

§ 163. And the same manner is, where another lord spiritual or temporal, is lord of such a borough, and the tenants of the tene-

(1) It is thus in MS. "the other tenure *in socage*, in capite, in chivalry."—*Ed.*

(2) Note, Lit. 77 a, he that holdeth of the king by socage in chief, and dieth, his heir of full age, the king shall have livery and primer seisin only of the lands so holden, and not of the lands so holden of others; but if the heir of such tenant in

socage in chief be within the age of fourteen years at the death of his ancestor, he shall neither sue livery, nor pay primer seisin then, nor at any time after; and the reason thereof is, for that the custody of his body and lands in that case belong to the prothonotary as *guardiau in socage*.—*Note in MS.*

ments in such a borough hold of their lord to pay, each of them yearly, an annual rent.

As free socage in the country of lands, so free burgage in boroughs and cities, is the tenure of houses regularly; and they are the two base tenures in regard of knight's service. *Burgagium, socagium et feodum militare*, make usually Bracton's tripartite division. See the notes upon *Hengham*, 121. Burgage tenure of the king, &c. is in name and tenure but common socage. *Stamf. Prerog. fo. 13 a.*

§ 164. And it is called tenure in burgage, for that the tenements within the borough be holden of the lord of the borough by certain rent, &c. And it is to wit, that the ancient towns called boroughs be the most ancient towns that be within England; for the towns that now be cities or counties, in old time were boroughs, and called boroughs; for of such old towns called boroughs, come the burgesses of the parliament to the parliament, when the king hath summoned his parliament.

And for the better understanding of this tenure in burgage, we are to know, that the word "burgage" is compounded of the word "both," which in the Saxon language betokeneth pledges; for by the ancient law of this realm at that time it was ordained, for the more sure keeping of the peace, and for the better repressing of thieves and robberies, that all free-born men should cast themselves into several companies, by ten in each company, and that every of those ten men in the company should be surety and pledge for the forthcoming of his fellows, so that if any harm were done by any of those, and against the peace, then the rest of the ten should be amerced, if he of their company that did the harm should fly, and were not forthcoming to answer for that, wherewith he should be charged; and for this cause companies be yet in some places in England, and namely in Kent, called borrows of the bothes, pledges, or sureties. *Lambert, the Duties of Constables, fo. 6.—Vide his Perambulation of Kent, 22; read also of the original of this word "borough," Vestigianus' book, intitled, Restitution of decayed intelligences in Antiquities, fo. 112, dedicated to King James,*



and this was called the borough law.—See *Samuel Daniells' Chron. fo. 23 et 128.*

And agreable to Littleton in this section, thus you may read in *Co. Preface to his 9th part, fo. 5 a.* The ancient towns called boroughs, are the most ancient towns within England; for those towns which now are cities and counties, in ancient times were boroughs, and called burghes, for out of those ancient towns called burghes came the burgesses to the parliament, which are the very words of Littleton. *Vide 40 Ass. pl. 27. 11 H. 4. 2. 22 E. 4. 11.* So as it appeareth, that the ancient burghes are the most ancient towns of England, and consequently, long before the Conquest: and I have found many of them since the Conquest incorporated into cities, and distinguished into counties, but had been ancient burghes, from whom came the burgesses to the parliament, time out of mind before the Conquest; nay, divers of the most ancient burghes, that yet send burgesses to the parliament, flourished before the Conquest, and have been of little or no account to have such privilege newly granted unto them at any time since, and I could yet never find when any of them, or any other the ancient burghes, were of ancient time since the Conquest endowed with that privilege; and according 10 *Co. 123 b. 124 a.*

§ 165. Also, for the greater part such boroughs have divers customs and usages, which be not had in other towns. For some boroughs have such a custom, that if a man have issue many sons, and dieth, the youngest son shall inherit all the tenements which were his father's within the same borough, as heir unto his father by force of the custom; the which is called borough English.

Also, for the greater part such boroughs have divers customs and usages, which greater towns have not; and divers ancient towns, so incorporate, have power to hold plea by writ *de ex gravi querela.* *Vide Finch, li. 2. cap. 8. 48 a.*

But it seemeth that this custom of borough English, as all other customs which are contrary to the common law, shall be taken strictly; so that if a man be seised of lands of this nature, and hath issue none but daughters, they shall all inherit as at the common law, and not the youngest only; and so if he die without issue, and have three brothers, his eldest brother shall be his heir. *Vide*

22 E. 3. *Prescription*, 40, *Fitz.* 11 II. 4. 32 a. 21 E. 4. 24 a, where it is said, that custom shall be allowed as hath been used, and not otherwise. *Vide Lambert's Customs of Kent*, 401.

The cause and occasion why this custom is called borough English, I cannot conjecture, unless because the same law or custom is not used in any foreign realm; as the estate which a man hath in lands of his wife, after her death, and issue had, is termed estate by the curtesy of England, because the like law is not elsewhere.

And in Nottingham there are two tenures, viz. burrough Engloys and burrough Francoys; whereof the usages of the said tenures are, that all the tenements whereof the ancestor died seised in burrough English, shall descend to the youngest son; and all the tenements in burrough Francoys shall descend unto the eldest, as at the common law. *Pasc.* 1 E. 1. fo. 10. pl. 38.

§ 166. Also, in some boroughs, by custom, the wife shall have for her dower all the tenements which were her husband's.

Of customs concerning the dower of women, varying from the course of the common law, mention is made also before, *sect.* 37.

And in Worcester the custom is, that the wife shall have all for her dower, and is called francke-bank: *Bracton*, li. 4. tract. 55. cap. 13: and so is the custom called the vise, in Wiltshire, as appeareth in 26 *Ass.* pl. 2, cited in *Plowden*, 411 b, and in some boroughs it is called ancient. *Barton*, 21 E. 4. 35 b. And how this custom shall be pleaded, see 12 E. 4. 9.

It seemeth by ancient books, viz. 45 *Ass.* pl. 8, et 40 *Ass.* pl. 41, that this custom, or any other, might not be in gildable or upland towns, but only in boroughs, or cities incorporate; and 40 *Ass.* pl. 27, is, that such customs cannot be in part of a town or borough, but in all throughout; howbeit, by 21 E. 4. 53, it seemeth otherwise; and so is Fitzherbert's opinion in the abridging the case.—*Bar.* 119.

And so it seemeth by the words of Littleton, *sect.* 37, viz. by the custom of some county a woman shall have the moiety, and by the custom of some town or borough, she shall have the entirety.

Concerning the dower of the moiety by the custom of Kent, in lands there, of the nature of gavelkind, read in *Lambert*, 395, et seq. where many cases are well put concerning the matter.

In the case of burrough English, I have not read what the custom hath been concerning dower; but if in any such borough no custom is known, in that case then, for so much as the husband was seised in the lands of estate of inheritance, she shall have dower according to the course of the common law.

§ 167. Also, in some boroughs, by the custom, a man may devise by his testament his lands and tenements, which he hath in fee simple within the same borough at the time of his death; and by force of such devise, he to whom such devise is made, after the death of the devisor, may enter into the tenements so to him devised, to have and to hold to him, after the form and effect of the devise, without any livery of seisin thereof to be made to him, &c.

§ 168. Also, though a man may not grant, nor give, his tenements to his wife, during the coverture, for that his wife and he be but one person in the law; yet by such custom he may devise by his testament his tenements to his wife, to have and to hold to her in fee simple or in fee tail, or for term of life, or years, for that such devise taketh no effect but after the death of the devisor. And if a man at divers times makes divers testaments, and divers devises, &c. yet the last devise and will made by him shall stand, and the others are void.

But of copyhold lands of estate of inheritance, no dower is for women, if custom have not approved it more or less. 4 Co. 30 b.

Burgages devisable (1), see in the statute 11 E. 1. Acton Burnell, and Bracton, fo. 272. *Revera terminatum est quòd potest legari ut catallum, tam hæreditas quàm perquisitum per Barones Londini et Burgenses Oxford, et ideo verum est quòd in burgis non jacet assisa mortis antecessoris. Vide sect. 169.*

And the reason of this custom (2) was, for that inheritants of boroughs or cities, whose traffic and trade resteth much upon mutual

(1) See Wild's case, 6 Co. 17 a, where a man may devise his land at the common law, without the consent of his heir apparent. Glanville, lib. 7. cap. 1. fo. 44.—Note in MS.

(2) See 44 E. 3. 33 a. Tanke that this is an unreasonable custom.

The wife cannot devise to any man, without the assent of her husband. Ergo not to the husband; for he cannot assent, and so make an estate to himself. Vide Fitz. N. B. 86 B.—Note in MS.

trust and credit, are oftentimes indebted at the time of their death; wherefore it was thought meet, that they might devise their lands for the due satisfaction of their creditors.—*A Brief Discourse of the Customs of London*, fo. 8.

It followeth in this section, that where such a custom is, by force of such devise, he to whom such devise is made may enter into the tenements so to him devised, to have and to hold unto him according to the effect of the devise, without livery of seisin to be made unto him.

The reason, wherefore the devisee may enter into those lands without livery of seisin, is, the favor which the law hath to the performance of the last will of the testator: and for that reason, if a devise or last will be made of a rent, or of a reversion, there shall not need to be any attornment made to the devisee, which you may see at large afterwards: *sect.* 585, 586: for the law doth never require circumstances, when it may subvert the substance: *8 Co.* 76 *b*: neither is it necessary, that the will, wherein burgage land is devised, should be written, the same lands being devisable before the making of the statute of wills, 32 H. 8. cap. 1, prescribing the form of a devise to be in writing.

§ 169. Also, by such custom a man may devise by his testament, that his executors may alien and sell the tenements that he hath in fee simple, for a certain sum, to distribute for his soul. In this case, though the devisor die seised of the tenements, and the tenements descend unto his heir; yet the executors, after the death of the testator, may sell the tenements so devised to them, and put out the heir, and thereof make a feoffment, alienation, and estate, by deed or without deed, to them to whom the sale is made. And so may ye here see a case, where a man may make a lawful estate, and yet he hath nought in the tenements at the time of the estate made. And the cause is, for that the custom and usage is such. For a custom, used upon a certain reasonable cause, depriveth the common law.

§ 170. And note, that no custom is to be allowed, but such custom, as hath been used by title of prescription, that is to say, from time out of mind. But divers opinions have been of time out of mind, &c. and of title of prescription, which is all one in the law.

For some have said, that time out of mind should be said from time of limitation in a writ of right; that is to say, from the time of King Richard the First after the Conquest, as is given by the statute of Westminster the First, for that a writ of right is the most high writ in its nature, that may be. And by such a writ a man may recover his right of the possession of his ancestors, of the most ancient time, that any man may by any writ by the law, &c. And in so much that it is given by the said statute, that in a writ of right none shall be heard to demand of the seisin of his ancestors of longer time than of the time of King Richard aforesaid, therefore this is proved, that continuance of possession, or other customs and usages used after the same time, is the title of prescription, &c. And this is certain. And others have said, that well and truth it is, that seisin and continuance after the limitation, &c. is a title of prescription, as is aforesaid, and by the cause aforesaid. But they have said, that there is also another title of prescription, that was at the common law before any statute of limitation of writs, &c. and that it was, where a custom or usage, or other thing, hath been used, for time whereof mind of man runneth not to the contrary. And they have said, that this is proved by the pleading; where a man will plead a title of prescription of custom, he shall say, that such custom hath been used from time whereof the memory of man runneth not to the contrary, that is as much to say, when such a matter is pleaded, that no man then alive hath heard any proof of the contrary; nor hath any knowledge to the contrary; and insomuch that such title of prescription was at the common law, and not put out by a statute, *ergo*, it abideth as it was at the common law; and the rather, insomuch that the said limitation of a writ of right is of so long time passed. *Ideo quære de hoc.* And many other customs and usages have such ancient boroughs.

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And note, that no custom is allowable, but such a custom, which hath been used by title of prescription, *scilicet*, from the time whereof the memory doth not run unto the contrary: and prescriptions are of two sorts, one at the common law, the other as it

is limited and restrained by acts of parliament; concerning the latter, divers statutes have been made in the times of several kings of this realm, after the Conquest; the first whereof was *anno* 3 E. 1. commonly called Westm. cap. 38. whereby it was provided, that in a count counting of descent in a writ of right (which writ is the most highest within the law, and by the writ, a man may recover his right of the possession of his ancestors, from the most ancient times, that a man may by any writ by the law) none shall be heard to count of the seisin of his ancestors of any longer seisin, than from the time of Richard the First. *Note in* 5 Co. 108 a, *and in Stamf. Prerog.* 38, that the statute 17 E. 2 was made within time of memory; and in 3 Co. fo. 8 b, the statute of Westm. 2. cap. 1. Tail. *Nota* therefore the consequence. And after, other statutes of limitation were also made 32 H. 8. cap. 2, and 1 Mary, 1st parliament, cap. 5, which read also. These statutes were made by several kings for the great commodity of the subject in avoiding infinities and uncertainty; for certainty doth engender repose, and uncertainty contention, *et expedit reipublicæ, ut sit finis litium, et vigilantibus non dormientibus subveniunt jura*; and of this nature and to that effect are fines levied of lands, tenements, and hereditaments; whereof read *Stowell's case in Plowd. and ibid. fo. 371 b*, touching the recited statutes of limitation.

The other prescription here mentioned is, where a prescription, or usage, or other thing, hath been used from time whereof the memory of man doth not run to the contrary; and this is as much as to say, that no men then living have seen or heard any proof to the contrary; and in *Co. Pref. to his 3d pt. fo. 2 b*, the words to this effect aforesaid are, whereof no man then knew the contrary, either out of his own memory, or by any record or other proof. *Vide* 3 Co. fo. 8 b, in *Heydon's case*: and see more in the title of Copyhold.

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§ 171. Also, every borough is a town, but not *è converso*. More shall be said of custom in the tenure of Villenage.

Every borough is a town, but every town is not a borough; for boroughs are ancient towns, so incorporated, with power to hold writ *de ex gravi querela*, or such; and for the most part such boroughs have divers customs and usages, which other towns have not. *Vide* 10 Co. 124 a. But upland towns are not ruled and governed as a borough is, and therefore are called villages or towns,

although they be inclosed with walls: Ludlow and such like; the names of all towns in England, and which be so incorporate, and which are not of record in the Exchequer: 40 *Ass. pl.* 27, et 41. *Vide Finch, b. 2. fo.* 39; and see *Fortesc. c.* 84; also villages and pages came more hardly and more lately unto the faith, than great towns and cities did; and thereupon grew that name of opposition, which was between christians that dwelt in cities, and the infidels that dwelt in [pages, that the one were called] pagans, the others were called christians, taking their names upon the difference of the places where they dwelt. *Doctor Ridley, 172.*

## LIB. II. CAP. XI.—VILLENAGE.

§ 172. Tenure in villenage, is most properly when a villein holdeth of his lord, to whom he is a villein, certain lands or tenements according to the custom of the manor, or otherwise, at the will of his lord, and to do to his lord villein service; as to carry and re-carry the dung of his lord out of the city, or out of his lord's manor, unto the land of his lord, and to spread the same upon the land, and such like. And some free men hold their tenements according to the custom of certain manors, by such services. And their tenure also is called tenure in villenage, and yet they are not villeins; for no land holden in villenage, or villein land, nor any custom arising out of the land, shall ever make a free man villein. But a villein may make free land to be villein land to his lord. As where a villein purchaseth land in fee simple, or in fee tail, the lord of the villein may enter into the land, and oust the villein and his heirs for ever; and after, the lord (if he will) may let the same land to the villein, to hold in villenage.

The proper description of a tenure in villenage, as in this place is shewed, is when the tenant is a villein, and his estate in the land is uncertain; as at the only will and pleasure of the lord; and lastly, when the services reserved thereupon to be done are base; as to carry the lord's dung out of the city, or out of the lord's manor into the lands of the lord, in laying it upon the land, and such like. But many free men, as we see in common experience, do hold their lands

and tenements according to the custom of certain manors, by such services, and at the will of the lord, whose tenure is also called tenure in villenage; for all copyholders are called *nativi tenentes*; and in ancient time, as Fitzherbert saith in his *N. B. fo. 10*, they were called tenants in villenage, or in base tenure, or by the verge; and [in the] Saxons' time, before the conquest, such lands were called "folkland," at which time charter lands were called "bockland." *Kitchin*, 128 *b*.

*Villanus* by old authority differeth from *burgensis* only as *villa* from *burgus*, not as our law now useth it, for *servus* or a bond slave. *Selden's Titles of Honor*, 268.

*Est quidem servitus constitutio de jure gentium, quâ quis domino alieno contra naturam subjicitur* (1): *et dicitur à servando non serviendo; antiquitus enim solebant principes captivos vendere, et ideo eos servare, non occidere. Vide Doctor Cowell's Inst. fo. 7.*

The reason is apparent (*scilt.*) no lands holden in villenage or villein lands, nor any custom rising of the land, shall ever make a free man a villein or bondsman; but a villein may make free land to be villein land; *magis dignum trahit ad se minus dignum.* *Finch*, *fo. 7 a*.

As a villein who doth purchase free land shall make it villein land, according to the nature of his person, who holdeth it; so the person of the king, who is most free, and hath divers prerogatives and infranchises, shall make the land which he doth hold to ensue the nature of his person, and to be ordered according to his privileges.

*Villenagium non facit liberum hominem villanum, si liber homo teneat per villanas consuetudines, quia tenementum nihil confert, nec detrahit personæ: Bracton, lib. 2. fo. 24 b:* and as villein land shall not make a free man to be of villein estate, no more shall any noble or honorable lands, as earldoms or baronies, which be come unto the possession of any ignoble person, make him thereby to be noble or honorable.

The example hereof followeth, as where a villein doth purchase lands in fee simple or in fee tail, the lord of the villein may enter in the lands, and put out the villein and his heirs for ever, and afterwards the lord may, if he will, let the lands to his villein to hold in villenage.

(1) See Co. Lit. 116 *b*.—*Ed.*



But it is to be observed, when a villein hath an estate in tail in lands, and the lord doth enter therein, and put out his villein, the lord doth not thereby gain the absolute fee simple of that land to the disinherison of him in the reversion, or in the remainder; neither is he tenant in tail, as his villein was; for that it is not according to the form expressed in the gift, and by the statute of Westm. 2. cap. 1. *voluntas donatoris in donis conditionalibus est observanda* (1).

And yet, as Littleton here saith, the lord of the villein may enter into the land so given in tail, and put out the villein and his heirs for ever, and the lord hath gained in this a fee simple, which is determinable upon the extinguishing of the issues of the body of his villein; and in the mean time that fee, which the lord hath in the land, shall descend to his heirs, and his wife is thereof dowerable; and if it descend unto his heir, it shall be assets unto the heir in an action of debt, or to render in value for the warranty of his ancestor. *Vide Plowd. 555 a. 557 a.*

§ 173. And note, if a feoffment be made to a certain person or persons in fee, to the use of a villein; or if a villein, with other persons, be infeoffed to the use of the villein; what estate soever that the villein hath in the use, in fee tail, for term of life, or years, the lord of the villein may enter into all those lands and tenements, as if the villein had been sole seised of the demesne. And this is given by the statute of *anno 19 H. 7. cap. 15.*

Concerning this statute made 19 H. 7. cap. 15, which hath taken away the abuses of uses in this case, I purpose to say nothing, partly because it is touched before, *sect. 115*, and partly because not only this and some other particular mischiefs by uses, but all in general, are remedied by the statute made 27 H. 8. cap. 10. *Vide Doctor & Student, fo. 140.*

§ 174. But if a free man will take any lands or tenements, to hold of his lord by such villein service, viz. to pay a fine to him for the marriage of his sons or daughters, then he shall pay such fine for the marriage; and notwithstanding though it be the folly of such free man to take in such form lands or tenements to hold of the lord by such bondage, yet this maketh not the free man a villein.

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(1) See Co. Lit. 117 a.—Ed.

Though every free-man may marry his daughter to whom it please him and her, yet if he will accept lands by such villein service, as to pay a fine for licence to marry his daughter, he is thereby bound to do so; *modus et conventio vincunt legem*: but nevertheless that base service or tenure doth not make his person a villein; according thereto is 43 E. 3. 5 b; but the lord of a manor cannot prescribe to have such a fine of his tenant in that case, for the unreasonableness thereof as hereafter appeareth. Sect. 209.

§ 175. Also, every villein is either a villein by title of prescription, to wit, that he and his ancestors have been villeins time out of mind of man; or he is a villein by his own confession in a court of record.

*Item*, some are villeins by title of prescription; others by their confession in court of record; 19 H. 6. 32, according; but such a confession in the country shall not conclude him; of which diversity, and of the authority of the court of record, is sufficient before spoken in the 146th section: and the same law is, if upon an issue the plaintiff be found to be a villein. 17 E. 3. 23 a, and 11 H. 4. 26 a.

§ 176. But if a free-man hath divers issues, and afterwards he confesseth himself to be a villein to another in a court of record; yet those issues which he hath before the confession are free, but the issues, which he shall have after the confession shall be villeins.

But if a free-man have divers issues, and after he do confess himself to be a villein to another in a court of record; yet the children, which he had before the confession, be free, and their father's subsequent act shall not be prejudicial to them in that case; but the children which he hath after the confession, shall be villeins: 18 E. 3. 30 a. *quod fuit concessum*: for *ex leproso parente leprosus generatur filius*. But after a divorce *causa consanguinitatis*, the issues before had, are bastards; *ibid.*; because the very marriage before had, by such divorce, is avoided. But if the lord do manumit his villein *in toto sæculo suo*, this shall be no manumission for his children, who

were born before the manumission, because they were villeins in possession, and therefore there should be other words for them besides these words *procreatis et procreandis*. 15 H. 7. 14 a.

If the king do make an alien to be denizen, those children which he hath before, be aliens, and the issues which he hath after, be denizens, and shall inherit their father, and not the eldest, who were born before. *Brooke, Villenage*, 69.

If the king and his subjects should conquer another kingdom or dominion, as well the *ante-nati* as the *post-nati*, as well they which fought in the field, as they that remained at home, for defence of the country, or [that were] employed elsewhere, are all denizens of the dominion conquered, and have the like privileges and benefits there, as they have in England. 7 Co. 16 a. 18 a. But when James King of Scotland inherited England by lineal descent, in that case the *ante-nati* of Scotland were not denizens of England, but the *post-nati* only. *Calvin's case*, 18 b, in 7 Co. *Vide Doctor Ridley*, fo. 100.

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§ 177. Also, if a villein purchase land, and alien the land to another before that the lord enter, then the lord cannot enter; for it shall be adjudged his folly, that he did not enter, when the land was in the hands of the villein. And so it is of goods. If the villein buy goods, and sell or give them to another, before the lord seiseth them, then the lord may not seise the same. But if the lord, before any such sale or gift, cometh into the town, where such goods be, and there, openly amongst the neighbours, claim the goods, and seise part of the goods, in the name of seisin of all the goods which the villein has or may have, &c. this is a good seisin in law, and the occupation which the villein hath after such claim in the goods shall be taken in the right of the lord.

The property of the lands or goods which a villein hath, shall not accrue to the lord without entry or seisin first made by him, and the villein in the mean time hath present property therein: *vide Doct. & Stu. lib. 2. cap. 43*: and therefore it shall be adjudged his folly that he did not enter when the lands or goods were in the hands of his villein; *negligentia semper habet comitem infortunium*: 8 Co. 133 a: for in such case the villein may alien his lands, or give

his goods by the law; also if he do grant a rent-charge out of his land, and after the lord do enter into the land, yet he shall hold the land charged with the rent; for *cui licet quod majus est, non debet quod minus est non licere*: 4 Co. fo. 23. 5th part 7: because the title of the lord shall not have relation, but to the time of his entry. *Vide Keilw.* 103 b. And therefore if the villein make his last will and devise of his land, and die, or do make his testament of his goods, and the executors enter before the entry of the lord, his entry or seisure afterwards is too late, and out of due time. *Vide Brooke, Villenage*, 150. 73; and *Swinburne's Testaments*, 2d part 48. Also, the wife which the villein hath at the time of his purchase, or after, before the lord doth enter, shall be endowed. And *vide Finch*, li. 2. cap. 7. But the lord may have a replevin, if the beasts of the villein be taken; and yet he had no property in them at the time when they were taken; but now by his claim he hath gained property. *F. N. B.* 69.

But by the entry of the lord, all the land of the villein in that county is vested in the lord: but if lord and villein be, and the villein do purchase two acres of land in fee, which do lie in one county, and possession is executed in him accordingly, and the lord of the villein do enter into one acre, not claiming the other, the lord hath property but only in one acre. *Perk.* 47 b. And for the goods of the villein, if the lord, before any sale or gift, do come within the town where such goods be, and there openly amongst the neighbours do claim the goods, and also seise any parcel of them, in the name of all the goods which the villein hath, or hereafter may have, in the same county, this is said a good seisure in law, and the occupation which the villein hath, after such claim in the goods, shall be taken in the right of the lord: *vide* 21 E. 4. 81 a. 11 H. 4. 2: for if the lord seise the goods and deliver them to the villein again, if they be taken from him, the lord may have an action of trespass, or may take them again and have them. And by occasion of these words, two questions may be moved; first, whether the claim made by the lord in form aforesaid, be sufficient in law to vest the property of the goods which the villein there hath in them, in the lord, although he did not, or peradventure could not, come to the sight or possession of them, whereby he might seise any parcel of them; for the resolution of which, see 3 H. 4. 16, which is abridged by *Fitz. Barre*, 217. thus; *nota*, if the lord of the villein do claim the goods of the villein by word, this is a good seisure of them, though

he do not seise them actually; adjudged by all the court: *Brooke, Villenage*, 50: and such general seisure by word only is sufficient in divers cases, as where the lord of the manor hath by the king's grant *bona et catalla felonum*, or where, by the like grant, the almoner hath *bona et catalla felonum de se*. *Vide Doct. et Stud. li. 2. cap. 43. Contra et Brooke, Villenage*, 15. The second question is, because of these words in the seisure mentioned in the name of all the goods, which the villein hath or may have, which latter words are void in the law, and only of course, as the words commonly used in releases *aut [quæ] quovis modo in futurum habere potero*, mentioned sect. 446: and in a feoffment in fee the words usually are, "To have and to hold to the feoffee and his heirs for ever," as more at large in the first section you may read; for if the villein have, after such seisure, any other goods, he may lawfully give them away, that seisure notwithstanding (1). *Doct. et Stud. lib. 2. cap. 4.—See sect. 446.*

§ 178. But if the king hath a villein, who purchases land, and alien it before the king enter; yet the king may enter, into whose hands soever the land shall come. Or if the villein buyeth goods, and sell them before that the king seiseth them; yet the king may seise these goods, in whose hands soever they be. Because *nullum tempus occurrit regi*.

The condition of villein of the king is as the bond slave of the civil law, not only in respect of the property in any thing, which he hath gotten, but also in respect of his possessions; for whatsoever he hath he doth possess it for his lord.—*Swinb. li. 2. fo. 47 b.* But it is resolved in *5 Co. 52 b*, that in case of the villein of the king, as also in the case of an alien born, or a man attainted, so long as he doth live, [the inheritance or freehold of the land is not vested in the king till office found under the great seal, for that is an office of intitling.](2)

(1) Lord Coke says, "Here (&c.) doth imply an excellent point of learning, for that such a claim doth not only vest the goods, which the villein then hath, but

also which he after that shall acquire and get."—*Ed.*

(2) The addition of these words from the case in *5 Co.* seems requisite.—*Ed.*

And this rule *nullum tempus occurrit regi* is in the statute *de prerogativa regis*, cap. 8. whereof you may read at large in *Stamford's Prerogative*, fo. 32.

§ 179. Also, if a man let certain land to another for term of life, saving to himself the reversion, and a villein purchase of the lessor the reversion; in this case, it seemeth that the lord of the villein may presently come to the land, and claim the reversion as the lord of the said villein, and by this claim the reversion is forthwith in him. For in other form or manner he cannot come to the reversion. For he cannot enter upon the tenant for life. And if he should stay until after the death of the tenant for life, then perchance he should come too late. For peradventure the villein will grant or alien the reversion to another, in the life of the tenant for life, &c.

In this place is shewed how the lord may vest in him a reversion of the lands which his villein hath, after a lease for life or years; that is to say, he must come to the land and claim the reversion, which is in him, and out of the villein; and according it is resolved in 2 Co. 54 a, that in all cases the claim of a reversion or of a remainder as well in this case of the villein, as by force of a condition, must be made upon the land, and claim made out of the land is not sufficient; *vide sect. 417*: and by such coming upon the land of another, the lord, &c. are not trespassers: *see in Manxell's case, in Plowd. fo. 13*: so are the grounds of the law, if an entry may be lawful in the thing, it shall not be in him before entry; and if entry may not be, but claim, then it shall not be in him before claim; and if entry nor claim may be made, then it shall be in him by act of the law, without any act made by the party. *Plowd. 133*; and 1 Co. 97; and in *Digg's case*, 174. But if a villein do purchase a reversion, yet this cannot accrue to the lord without attornment first made to the villein; therefore in this case the tenant for life being lord to the villein did attorn to him, and yet it was no enfranchisement. *Perk. 6b*. And note, in all cases, when a reversion is settled by judgment of law, and he hath no possible means to compel the tenant, and no laches or default is in him, then he shall avow and have an action of waste, without attornment; as the lord in mort-

main or the lord of the villein, where they claim a reversion; by the claim the lord doth vest the reversion in him, and hath no means to compel the tenant to attorn, *et sic de cæteris*: 6 Co. 68: where the rule is put, *quod remedio destituitur ipsa re valet, si culpa absit*. But some things there are which the villein hath, and which the lord cannot divest from him by any means or diligence, as things in action, and an obligation made and payable unto him, or other debt, covenant, or warranty, made unto him. *Finch, lib. 2. 46 b. vide 27 H. 8. 10 b.* If a villein do purchase a common without number, the lord shall not have it, for he might surcharge it. *Et vide Sir John Davies' R. fo. 2 a.* And the great wisdom and policy of the sages and founders of our law is observable, who provided that no possibility, right, title, nor things in action, shall be granted or assigned unto strangers; for that would be occasion of multiplication of contentions, and suits, to the great oppression of the people, and principally of ter-tenants, and subversion of the due and equal execution of justice; and as those things cannot be granted by the act of the party, so a right in action cannot be transferred by act in law; as unto the lord by escheat; nor the lord of a villein shall have a thing in action; *vide Finch, 37 b;* as it appeareth in *22 Ass. pl. 37.* Also, it is resolved in the *Marquess of Winchester's case*, in 3 Co. 1. that by the general words of an act of attainder of treason, by which all lands, tenements, rights, and hereditaments of the person attainted be given unto the king, and no right unto lands in action is given unto the king, and all this was for the quiet and repose of ter-tenants. 10 Co. 48 a.

§ 180. In the same manner it is, where a villein purchases an advowson of a church full of an incumbent, the lord of the villein may come to the said church, and claim the said advowson, and by this claim the advowson is in him. For if he will attend till after the death of the incumbent, and then to present his clerk to the said church, then, in the mean time, the villein may alien the advowson, and so oust the lord of his presentment.

This case of the advowson of a church full of an incumbent is like to the last case, where the villein did purchase the reversion; for as in the one case the lord could not enter and put out the par-

ticular tenant, no more can he remove the present incumbent in this case; therefore the remedy, which the lord hath to prevent the alienation of his villein, is, to come unto the said church, and there claim the said advowson, and by this claim the advowson is in the lord. But it seemeth here, if the villein do not alien his advowson in the life-time of the incumbent, though the lord did not make any claim thereto; yet, the church being void by death or privation, the lord may present time enough unto the church, after which presentment made, the villein cannot alien it; for the presentment doth amount unto a claim, and thereby the estate, which the villein had then, is divested out of him, and settled in the lord; for though the advowson be a mere temporal thing, (*Doctor et Student*) yet the patron hath no right or possession in the church or glebe lands, but only a right to present his clerk. *Quære* if the villein present first, and the lord immediately after, which of their clerks of right ought to be instituted and inducted; and see in *Plowd.* 435a. how these two sections of Littleton are there applied.

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§ 181. Also, there is a villein regardant, and a villein in gross. A villein regardant is, as if a man be seised of a manor to which a villein is regardant, and he which is seised of the said manor, or they whose estate he hath in the same manor, have been seised of the villein and of his ancestors as villeins and neifs regardant to the same manor time out of memory of man. And villein in gross is, where a man is seised of a manor whereunto a villein is regardant and granteth the same villein by his deed to another, then he is a villein in gross, and not regardant.

Concerning these two sorts of villeins, *scilicet*, villeins regardant, and villeins in gross, the text is plain and needs no exposition: according is *Perkins*, 22a. Villein regardant to a manor, and advowson appendant to a manor, may be severed from the manor to which they are appendant; but it is observable this severance must be by deed.

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§ 182. Also, if a man and his ancestors, whose heir he is, have been seised of a villein and of his ancestors, as of villeins in gross time out of memory of man, these are villeins in gross.



Also, there is another means to have a villein in gross, viz. by prescription; and in this case it is proved, that a man may have an inheritance in a villein; *nota 5 Co. 87 a.* and therefore a woman may be endowed of a villein in gross: *Perk. 68*: as to have his service every three days: and a man may be tenant by the curtesy of a villein.

§ 183. And here note, that such things, which cannot be granted, nor aliened, without deed or fine, a man which will have such things by prescription, cannot otherwise prescribe, but in him and in his ancestors, whose heir he is, and not by these words, "In him and them whose estate he hath;" for that he cannot have their estate without deed or other writing, the which ought to be shewed to the court, if he will take any advantage of it. And because the grant and alienation of a villein in gross lieth not without deed or other writing, a man cannot prescribe in a villein in gross without shewing forth a writing, but in himself which claims the villein, and in his ancestors whose heir he is. But of such things, which are regardant or appendant to a manor, or to other lands and tenements, a man may prescribe, that he and they whose estate he hath, who were seised of the manor, or of such lands and tenements, &c. have been seised of those things, as regardant or appendant to the manor, or to such lands and tenements time out of mind of man. And the reason is, for that such manor or lands and tenements may pass by alienation without deed, &c.

By occasion that in the precedent sections is declared, that a man may be seised of a villein by prescription two divers ways, either regardant to his manor, or in gross, and in both cases he hath an inheritance in the villein; the author in this place doth set down a general rule how prescription shall be made in those distinct cases, and others, according to the reason and rule of the law, which note; and the same is exemplified by the express different words in the cases precedent; for in the first case, which is villein regardant to a manor, the prescription is by a *que estate*, that is, that he and those [whose] estates he hath, who were seised of a manor, or of

such lands and tenements, have been seised of such things as regardants, or appendants unto the manor, &c.; but of such things which may not be granted or aliened without deed or fine, as a villeiny, a man, that will have such things by prescription, cannot otherwise prescribe, but only in himself and in his ancestors, whose heir he is, and not by these words "in him and in those *que estate* he hath:" *ratio patet in libro*.

And of this matter it is thus in *Finch's Book*, 40 a. In all things but land itself (for in land prescription doth not make any right) a man may prescribe against others; that is to say, if he and his ancestors time whereof memory, &c. have had it; as if they were seised of a certain yearly rent out of land, and have distrained [for it], being behind, or of a villein, and his ancestors, as of villeins in gross: or that a man, and all those whose estate he hath in the manor of Dale, have had a park there time whereof memory, &c.; for of such things which cannot be granted without deed or fine, as in cases of a villein in gross, hundred, rent, or such like, the prescription shall be in him and his ancestors, whose heir he is, and not in him and those whose estate he hath; because he cannot have their estate without writings, which must be shewed unto the court; otherwise it is of things appendant or regardant to a manor.

*Vide* 10 Co. 59 (1), where the diversity was taken between the allegation of the conveyance to the matter itself, as in 11 H. 4. fo. 89, there one to convey unto him title to a leet did prescribe, that he and all those whose estate he had in the hundred, have had a leet; *et bene*; for the prescription in the hundred is but conveyance: and with this doth agree 19 R. 2. tit. *Action sur le Case*, 51. But when he doth claim any thing that doth lie in grant by prescription originally, and of itself, he cannot prescribe in this by a *que estate*, as Littleton doth hold. *Vide* 21 H. 7. 15. And Keble saith, in 12 H. 7. fo. 16 b. that a man cannot entitle himself by a *que estate* in any thing, except in such where entry may be made; but in rent, office, common, and such like, no entry may be made in them, and therefore the title in *que estate* is not good. And in the case, where an officer of this place would prescribe in a thing appendant to his office, he sheweth that he, and all officers of the same place, have had from time whereof memory doth not run, and have used to have, such things of profits; but cannot say, that he

and all those *que estate* he hath in the office, &c.; for he hath not their estate; and so because no entry may be in [a] hundred none may prescribe by a *que estate*; but he may say that he and all his ancestors, or he and all his predecessors, have used it always, and this is good.

§ 184. And it is to be understood, that nothing is named regardant to a manor, &c. but a villein. But certain other things, as an advowson and common of pasture, &c. are named appendant to the manor, or to the lands and tenements, &c.

This place doth shew that lawyers must speak lawyer-like, and use words according to the lawyer's dialect, and no other, as before is touched, sect. 57. and according is 10 H. 7. 4b.

§ 185. Also, if a man will acknowledge himself in a court of record to be a villein, who was not a villein before, such a one is a villein in gross.

As a man may be a villein in gross by grant made of him by deed, where before he was regardant, and not in gross; or he may be a villein in gross by prescription only, though he never was regardant to a manor, as before appeareth; so in this place is said, if a man will in court of record confess himself to be a villein in gross, who was no villein before, he is a villein in gross: *See more of Confession, sect. 175, and sect. 146.* If a man will come in court of record, and there confess, that he hath committed felony or treason, and shew the certainty thereof, the day and place, it is good, and the strongest and most clear evidence that can be, though peradventure he never did commit such offence; *quilibet potest renunciare juri pro se introducto*: 10 Co. 101 a. and see in *Manxell's case*, in *Plowd. fo. 6b.* But if a man will come into a court of record, and there confess himself to be an alien born, or a bastard, such confessions shall not be effectual in the law; for *jura naturalia immutabilia*, whereof read at large in 7 Co. 13b.

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§ 186. Also, a man which is villein is called a villein, and a woman which is villein is called a nief: as a man which is outlawed is called outlawed, and a woman which is outlawed is called waived.

In this, as in the other section 184, that formality of speech is only to be used by professors of the law, which the law hath from time to time used and approved; for they are the most significant, as in this place may appear; a man that is a villein is called a villein, but a woman villein is called nief; so a man that is outlawed is said outlawed, and a woman that is outlawed is said waived; for a woman shall not be compelled or constrained to come to tourns of the sheriffs, nor leets: and because women shall not be sworn in the king's leets, as men which be of the age of twelve years, or more, shall do; it is said, when a woman is outlawed she is waived, and not outlawed, for she was never sworn to the law. [But a man is said outlawed, because he was sworn to the law;] and now for contumacy he is put out of the law *et dicitur m̄legatus quasi extra legem positus*; but a woman is not so, because she was never sworn to the law. *Fitz. 161 A. (1)* Bracton *accordat, li. 3. 125*, where it is said, *est enim wayvium quod nullus eo advocat, nec princeps eam advocabit, nec tuebitur*. Observe that this oath of liegeance at the tourn or leet, was first instituted by King Arthur, whereof read in *7 Co. fo. 13*.

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§ 187. Also, if a villein taketh a free woman to wife, and have issue between them, the issues shall be villeins. But if a nief taketh a free man to her husband, their issue shall be free.

This is contrary to the civil law; for there it is said, *partus sequitur ventrem*.

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According to the distinction in this place, it is said in *43 E. 3. fo. 12b.* that of common right, and by the law, a man shall be adjudged according to the blood that his father is of, and not according to the blood of his mother; and according to this inheritance shall descend, because it is more worthy. As if a man purchase land in fee simple, and die without issue, it shall descend to the

heir of the part of the father, if any such be, and not to the heir of the part of the mother, except there be no heir of the blood of the father, at the time of the death of the purchaser.

In this very point [the] civil law is contrary to our common law; for we say, *partus sequitur conditionem patris*; but with them the rule is, *partus sequitur ventrem*; the reason for both sides are well set down in *Fortescue, cap. 42*.

The reason why in the civil law, if villein did marry a free woman, the issue should be esteemed free after the condition of the mother is, because *jura connubii* (before christianity received) extended only to free men; so that when a bond man did marry a free woman *partus sequebatur ventrem* in regard no loyal father was of such a birth; and marriage with bond persons were always accounted *contubernia et non conjugia*, and they were stiled *contubernales* and not *conjuges*, as saith the learned Mr. John Selden, in his *Fortescue, fol. 50b. 52a*.

*Nota*, for there it will appear which law is most reasonable in this case; but for the clear understanding the sense of the rule in the civil law in this text [read] the notes upon *Fortescue, cap. 42, et nota bene*.

And it is not impertinent to know, how the husband and wife in this case shall be adjudged, by such disparaged marriage respectively: if a free man take a nief to his wife, she by this marriage is made of free condition with her husband, not only during the marriage betwixt them, but perpetually, as *Fitzherbert* proveth at large in his *N. B. fo. 78 G. Doctor Cowell's Inst. li. 1. fo. 9. according. [Fitz. Abr.] Villenage, 46*. And common experience is, if a woman, descended of ignoble parents, do take any of the possibility of her husband, she shall be partaker of her lord's dignity, and of all privileges incident to his degree, not only during the coverture between them, but during her life. Nevertheless the opinion is in the *Doctor & Student, lib. 2. cap. 43. fo. 140a*. that at the dissolution of the marriage she is a nief, as she was before; and see *4 Co. 55a. Perk. 62b. Villenage*; therefore *quære*. As if an English man do marry with an alien woman, though she [be a] denizen during the coverture, and their issues inheritable, yet after the death of her husband, she is an alien; but in that case if an English man do marry with a French woman, inheritor of lands in France, and they have issue in England, these issues shall inherit those lands in France, as heir to their mother, *quia partus sequitur ventrem*, according to the civil law, as before, for she is not dowable. *7 Co. 25a*. But on the other part all the books

do agree, that *libera mulier nubens villano villana non fit*. Doctor Cowell's [Inst.] 9. et Fitz. 78 G. [Hocque] fit favore libertatis contra communem juris nostri regulam, quā dicitur, uxor eadem cum viro caro fieri. Vide Dyer, 79. See sect. 162. The king doth create a feme covert a marquess, whose [husband] is a knight; but if a feme of no degree of honor be married to a nobleman, she shall partake of his nobility; if after the death of such her noble husband, she doth marry any unnoble second husband, she hath thereby lost her nobility, which she had by her first marriage; for the rule is *eodem modo quo quid constituitur dissolvitur*. 4 Co. 118. et vide in Dyer, 79b.

§ 188. Also, no bastard may be a villein unless he will acknowledge himself to be a villein in a court of record; for he is in law *quasi nullius filius*, because he cannot be heir to any.

A bastard, or the issue of a bastard, (5 H. 7. 14. 43 E. 3. 4b.) cannot be a villein, either regardant to a manor, or in gross by prescription; and divers things are observable in this case; first, concerning bastardy, *dicitur a Græco vocabulo*, [bossaris], *scilicet meretrix, seu concubina, quia procreatur ex meretrice, sive concubinā*: 8 Co. 102a: and of the divers sorts of bastards in the civil law read in Doctor Ridley's book, titled *A View of the Common and Civil Law*, fo. 199. The words of Littleton are, "that a bastard is in law *quasi nullius filius*," because he cannot inherit to any; and to that effect you may read Fortescue, in *Commendation of the Laws of England*, cap. 39, and cap. 40; where also is said;

*Cui pater est populus, pater est sibi nullus, et omnis;*

*Cui pater est populus, non habet ille patrem.*

But although a bastard is disabled by our law to inherit by descent, as heir, yet as a subject born he is enabled to purchase lands, or by any conveyance to take a remainder limited to him; and so note the diversity between descent and purchase, in 6 Co. 65a. And as the law is of our realm, so I think all other civilists at this day do exclude bastards, without a subsequent legitimation, from inheritance, which legitimation by the imperial or civil [law] is made by divers means, as you may read in Doctor Ridley's book, before named, and one example thereof is in Littleton, sect. 400; and so is the general law of France, as you may see in Selden's *Review to his History of Tithes*, fo. 484.

§ 189. Also, every villein is able and free to sue all manner of actions against every person, except against his lord, to whom he is villein. And yet in certain things he may have against his lord an action. For he may have against his lord an action of appeal for the death of his father, or of his other ancestors, whose heir he is.

A villein may well maintain any action against any stranger, who is not his lord, and herewith doth agree *Bracton*, li. 4. tract. 1. cap. 23. fo. 196; in assise by a villein *versus non dominum, non valebit ei exceptio, quia servus est alienus, ex quo nihil ad ipsum utrum liber sit, an servus* (1); and 6 Co. 80 a. *vide librum*. Also, he may use actions against his lord for trial of his liberty, as *homine replegiando, libertate probanda*, and such like. *Vide Theloall*, li. 1. cap. 14.

That a villein may not use an action against his lord, it appeareth in *Bracton*, li. 5. cap. 20. fo. 421, n. 4; and therein agreeth *Britt*. cap. 49. fo. 125, and many other books.

And, therefore a villein cannot have an action against a farmer of a manor, to which he is regardant during the term. 20 E. 3. 83, *Villénage*, 10; for he is *dominus pro tempore*: and Littleton saith, in 15 E. 4. 32, and 14 E. 4. 6 b, that during the lease for years of such a manor, the villein may have an action against the lessor. *Vide* 38 E. 3. 21.

Also, certain actions a villein may have against his lord; for he may have an appeal against him of the death of his father, or other of his ancestors whose heir he is. 1 H. 4. 6 b, *according*; for the villein's heir doth not sue for the recovery of lands, goods, or liberty, from the lord, but only for a lawful revenge of his ancestor's death; and if the villeins should not have an appeal in this case, the said offence should remain unpunishable by appeal, for none other pursue it. *Poulton*, 152 a.

And *Bracton*, li. 1. cap. 9. fo. 6. 3, saith, *in potestate aliend sunt servi, quæ quidem potestas dominorum in servos suos a jure gentium est, quæ aliquando fuit et vitæ et necis servorum, sed nunc coarctata est per jus civile, ita quod vita et membra sunt in potestate regis, ita quod si quis servum suum occiderit non minus puniatur quam si alienum occiderit*.

§ 190. Also, a nief, that is ravished by her lord, may have an appeal of rape against him.

Also, a nief, that is ravished by her lord, may have an appeal of rape against him: *Britton*, 38 a: and so doth *Brooke* (*Villénage*, 59.) take the book. 29 H. 6, in *Fitz. Coron.* 17. *Keiho.* 135 a; but the book there is, that she shall not have an appeal in that case, but the king shall punish him by way of indictment; and so is *Stamford*, li. 2. cap. 10, in *fine*, contrary to Littleton.

§ 191. Also, if a villein be made executor to another, and the lord of the villein was indebted to the testator in a certain sum of money, which is not paid; in this case the villein, as executor of the testator, shall have an action of debt against his lord; because he shall not recover the debt to his own use, but to the use of the testator.

If the lord be indebted to J. at S. the creditor dieth, and maketh the villein of the lord his executor, or if the administration of his goods after his death is committed to him, the villein in this case may maintain an action of debt against his lord: 1 H. 4. fo. 6 b. and 21 E. 4. 50: the reason is, because he shall not recover his debt to his own [use], but to the use of the testator or intestate; for a man outlawed, or one excommunicated, is enabled to have an action as executor for the same reason. *Finch*, li. 1. fo. 8 a. and *Dr. Cosin's Apology*, fo. 7 a. *Vide Theloall*, cap. 13. fo. 20 a.

§ 192. Also, the lord may not take out of the possession of such villein, who is executor, the goods of the deceased; and if he doth, the villein as executor shall have an action for the same goods so taken against his lord, and shall recover damages to the use of the testator. But in all such cases it behoveth, that the lord, which is defendant in such actions, maketh protestation, that the plaintiff is his villein; or otherwise the villein shall be enfranchised, although the matter be found for the lord, and against the villein, as it is said.

And for the cause alleged, the lord may not take out of the possession of such a villein, who is executor, the goods of the testator;



for if he do, the villein as executor shall have an action of trespass against him, and shall recover damages to the use of the testator; and because of the possession and interest in the goods of the testator, therefore those goods shall not be forfeited if the executor be outlawed. 10 E. 4. 16.

If a man have a villein for years, as executor to J. at S. if the villein do purchase lands in fee, and the executor do enter the lands, they shall be to the use of the testator, and assets in his hands (1); because this villein, who was the original cause of it, was. *To that vide Brooke, Villenage, 46, and the Doct. and Stud. fo. 92, and in Plowd. 292 a.*

And in the conclusion of this section you see the Author's opinion, how the lord may save himself by way of protestation; and so it was holden, 1 H. 4. fo. 6; that in such actions which a villein may have against his lord, the lord must make his protestation, that the plaintiff is his villein, &c. and afterwards plead in bar; and if the plea be found for him who made the protestation, the protestation shall serve, but if it be found against him, the protestation is void. But see in *Theloall, li. 1. fo. 21 b.* if in trespass by a villein against his lord, [the lord do take] such a protestation, if he do plead in bar it is to no purpose. And in debt upon an obligation, if the defendant do take such protestation, he must farther deny the deed, because the villein, that is, the plaintiff, shall be enfranchised by the deed.

And so in an *ejectione firme*, (*Protestation, 10.*) that the [lord] in a formedon brought against him by his villein, ought to make such protestation, and traverse the gift; and if the issue be found against him, the protestation shall serve for nothing.

§ 193. Also, if a villein sueth an action of trespass, or any other action, against his lord in one county; and the lord saith, that he shall not be answered, because he is his villein regardant to his manor in another county; and the plaintiff saith, that he is free, and of a free estate, and not a villein; this shall be tried in the county where the plaintiff had conceived his action, and not in the county where the manor is: and this is in favor of liberty. And for this cause a statute was made, *anno 9 R. 2. c. 2*, the tenor whereof

(1) See Co Lit. 124 a.—Ed.

followeth in this form. Also, for that where many villeins and niefs, as well of great lords as of other men, as well of spiritual as temporal, fly and go into cities, towns, and places franchised, as into the city of London, and other like places, and feign divers suits against their lords, because they would make themselves free by the answer of their lords: it is accorded and assented, that lords or others shall not be forebarred of their villeins by reason of their answer in law. By force of which statute, if any villein will sue any manner of action to his own use in any county, where it is hard to try against his lord, the lord may choose whether he will plead, that the plaintiff is his villein, or make protestation that he is his villein, and plead his other matter in bar. And if they be at issue, and the issue be found for the lord, then the villein is a villein, as he was before by force of the same statute. But if the issue be found for the villein, then the villein is free; because that the lord took not at the beginning for his plea, that the villein was his villein, but took this by protestation, &c.

In this section is shewed an example of the favor which the common law beareth to the freedom and liberty of men; for it is commonly said, the law doth favor three things, the life of a man, liberty, and a woman's dower (1). And in this case the favor is great, that the trial of this issue shall [not] be in the county where the manor is, where the lord is of power; and that the law is so at this day, *vide Dyer*, 39. et 248, *Ibid.* *Bro. Visne*, 10, and many books, as it is to be seen in *Ashe's Tables*, tit. *Villinage*, 15. But by consent in this case the trial may be altered from his natural trial. 44 E. 3. 36.

§ 194. Also, the lord may not maim his villein, for if he maim his villein he shall of that be indicted at the king's suit, and if he be of that attainted, he shall for that make grievous fine and ransom to the king. But it seemeth, that the villein shall not have by the law any appeal of mayhem against his lord; for in appeal of mayhem a

(1) See Co. Lit. 124 b.—*Ed.*

man shall recover but his damages; and if the villein in that case recover damages against his lord, and hath thereof execution; the lord may take that the villein hath in execution from the villein, and so the recovery is void, &c.

In case the lord doth maim his villein, how he is to be corrected for that offence, the opinion of the Author is at large declared, together with his reasons; but note in *Keilw.* 134 and 135, Keble's opinion; for by and by, when he is maimed by his lord, he is enfranchised, because by this act the lord hath given unto his villein cause to have an action against him: although he be a villein unto the lord, yet the king hath an interest in his person; for he shall be attendant on the king in the time of war for the safeguard of the realm, as well as any other liege-man of the realm: also, a villein shall be compelled to serve in husbandry, if the lord have not other servants sufficient, and so this doth prove that every man may have interest in a villein; but when he is maimed he cannot do service unto any. Also, if the lord cannot give to him meat and drink, he is not able to travel for his living: and a villein may have surety of peace against his lord; and it were against law and reason, that he might destroy him, for a servant may depart out of his service notwithstanding the retainer, if he be unreasonably entreated by his master; for the statute that doth give an action upon the departure is, that the servant shall not depart without reasonable cause; and so in this case it seemeth, that the bond is not so straight, but that the lord by his misdemeanor may forfeit it; and the law of the Bible is, *si quis oculum vel digitum à servo eruit, &c.* And I do suppose, if the heir of the villein do recover against the lord in appeal of the death of his father, and the lord is put in execution, the villein is enfranchised against the heir of the lord: the same law is, if the lord be executed in an appeal of rape at the suit of his nief she is enfranchised against the heir of the lord; and so it seemeth by reason that the villein by the maim is enfranchised by and by.

It is holden in 33 E. 3. (*tit. Trespass, 253.*) that the lord may beat his villein for cause or without cause, and the villein is without remedy; but if the lord do command another to beat his villein, he shall have an action of battery against him that did beat him. *Vide* 9 Co. 76 a. other cases to this purpose.

§ 195. Also, if a villein be demandant in an action real, or plaintiff in an action personal, against his lord, if the lord will plead in disability of his person, he may not make plain defence; but shall defend but the wrong and the force, and demand the judgment, if he shall be answered, and shew his matter by and by, how he is villein, and demand judgment if he shall be answered.

In all actions real or personal, which the villein shall bring against his lord, this case doth instruct how the lord shall demean himself in his defence or pleading, as doth appear; and according is 40 *E. 3. 36 a.* which case is abridged in *Bro. tit. Defence*, 21, thus; trespass, this defendant doth defend the wrong and force, &c. and demandeth judgment, if he shall be answered, for he is his villein, and sheweth how, &c.; and so you may observe that he doth not make a full defence, when he doth plead to the person, neither doth he say *hæc verba quando*, &c. for this doth go to the damages, and is a full defence. *Et accordat Littleton.*

§ 196 (1). Also, there are six manner of men who, if they sue, judgment may be demanded, if they shall be answered, &c. One is, where a villein sueth an action against his lord, as in the case aforesaid.

§ 197. The second is, where a man is outlawed upon the action of debt or trespass, or upon any other action or indictment, the tenant, or the defendant, may shew all the matter of record, and the outlawry, and demand judgment, if he shall be answered: because he is out of the law to sue an action during the time that he is outlawed.

The second is a person outlawed; but because outlawry is by record, therefore the tenant or defendant must shew forth all the matter of that record, and the outlawry, and thereupon demand

(1) The text of Littleton is seldom inserted in the MS. before the commentary on each section: in the present case the Commentator has merely given a literal translation of the section; I have thought it unnecessary to print it in his words. - Ed.

judgment; and thus the outlawed person be punished for his contempt, in not obeying the law, *frustrà legis auxilium invocat qui in legem peccat*, but *prudenter facit qui præcepto legis obtemperat*. 5 Co. 49. A man outlawed is out of the benefit of the municipal law, for so saith *Fitz. N. B.* 161 a. *utlegatus est quasi extra legem positus*, and *Bracton*, li. 3. tract. 2. cap. 11. fol. 125, saith, that *caput gerit lupinum, ita quod sine judiciali inquisitione rite percunt, et secum suum judicium portant, et merito sine lege percunt, qui secundum legem vivere recusaverint*. But *nota*, such an outlawed person is not out of his natural legiance, or of the king's natural protection; for neither of them is tied to municipal laws, but is due by the law of nature, which was long before any judicial or municipal laws; and therefore if a man were outlawed for felony, yet was he within the king's natural protection, for no man but the sheriff could execute him, as it is adjudged, 2 Ass. pl. 3. 7 Co. 14 a.

Note the words in this case are, the tenant or defendant may shew all the matter of the record, and the outlawry, and demand judgment if he shall be answered, &c. And in 21 E. 4. 54 a, it is said, when a man doth plead an outlawry in the same court, he that doth plead it may commence at the exigent, if he will; for although peradventure it be erroneous, yet it is good, till it be reversed; and so it is if an action of debt be brought upon a recovery, he may commence at the judgment, or at the original, at his pleasure, *quod fuit concessum*.

And note in *Dyer*, 228 a, if the plaintiff do answer to the plea, *quod non est tale recordum*, and the defendant do fail to bring in the record, yet it is not peremptory to the defendant, but he *respondera ouster*.

§ 198. The third is an alien, which is born out of the legiance of our sovereign lord the king; if such an alien will sue an action real or personal, the tenant or defendant may say, that he was born in such a country, which is out of the king's allegiance, and ask judgment if he shall be answered.

For the true understanding of this section and exception *propter defectum nationis*, which is the third exception, you may read at large in 7 Co. 16 a, *et seq.* so that I might save some labour not *actu agere*; nevertheless I will also with a light finger touch some points

of this matter. By the very words the Author's meaning doth appear, that he is an alien whose birth place is out of the *legiance*: (of the definition of this word *ligeantea*, see in 7 Co. 4 b.) of the king, and not he that was born *extra regnum Angliæ* or *extra legem Angliæ*, which are circumscribed to place; but *extra ligeantiam*, which is not local, nor tied to any place; for many times dominions may make a subject born; and contrariwise, though a man be born within England, yet for want of *legiance*, he may be an alien; and therefore if any of the king of England's ambassadors in foreign nations have children there, by their wives being English women, or merchants, or the king's soldiers, by the common law of England they are natural-born subjects, without being made denizens: and the usual and right pleading of an alien born doth lively and truly describe and expound what he is, which pleading is both exclusive and inclusive; viz. *extra ligiantiam domini regis, &c. et infra ligiantiam alterius regis*, as it appeareth in 9 E. 4. 7. *The Book of Entries*, fo. 244. Vide 7 Co. 16 a. And if enemies should come into any the king's dominions, and surprise any the castles or forts, and possess the same by hostility, and have issue there, that issue is not subject to the king, though he be born within his dominions; for that he was not born under the king's *legiance* or obedience; *et si desit obedientia non adjuvat locus*; and this agreeth with the divine, who saith, *si locus salvare potuisset, Satan de cælo pro suâ inobedientiâ non cecidisset; Adam in Paradiso non cecidisset; Lot in monte non cecidisset, sed potius in Sodom*. But the time of the birth is of the essence of a subject born; for he cannot be subject to the king of England unless at the time of the birth he was under the *legiance* and obedience of the king, and that is the reason that *ante-nati* in Scotland, are aliens born in respect of the time of their birth; for he cannot be a subject born of one kingdom, albeit afterwards one kingdom descend to the king of the other. But if the king of England and his subjects should conquer another kingdom or dominion, as well *ante-nati* as *post-nati*, as well they which fought in the field, as those which remained at home for the defence of the country, or [were] employed elsewhere, are all denizens of the kingdom or dominion conquered, and may maintain any real action, and have the like privileges and benefits there, as they may have in England.

Now from the express words we must go to the Author's meaning; for he did know that there be two sorts of aliens born, one a friend who is in league with our king, the other an enemy that is in open war, &c. an alien friend, as at this time a German, a Frenchman, a

Spaniard, &c., all the king's and princes in Christendom, being now in league with our sovereign, may, by the common law, have, acquire, and get, within this realm, by gift, trade, or other lawful means, any treasure or goods personal whatsoever, as well as an Englishman, and maintain any action for the same; but lands within this realm, or houses, but for their necessary habitation only, alien friends cannot acquire or get, nor maintain any action real or personal for them, for the causes and reasons in 7 Co. 18 b, in *Calvin's case*; unless the house be for their necessary habitation; for if they should be disabled to acquire and maintain these things, it were in effect to deny unto them trade and traffic, which is the life of every island: but if this be one his enemy, then he is utterly disabled to maintain any action, or get any thing within this realm, and according to this diversity, note *Dyer*, fo. 2 b.

If an alien born do sue an action real or personal, the tenant or defendant may say that the plaintiff was born in such a country, which is out of the allegiance of the king, saith Littleton and Hussey, in this case the trial shall be here, where the writ was brought. *Vide* 19 E. 4. 6 a, and note in 6 Co. 47 b, that the jury take knowledge of things done beyond the sea, and *ibid.* fo. 26 b. 27 a, in *Calvin's case*.

In real actions brought by an alien, the purpose and effect of this plea is for the benefit of the king, that he upon office found may seise, and that the tenant may yield the lands to the king, and not to the alien, because the king hath best right thereto; for it is said in our books that an alien may purchase only *ad profitum regis*; but that act of the law giveth to the alien nothing; for no dower or tenancy by the curtesy is in that case. *Vide ibid.* b.

Two things remain to be known; first, when an alien enemy doth bring an action of debt, and it is pleaded in bar, that he is subject to the king's enemy, &c., whether this exception be peremptory, or but dilatory, so that if at another time league and peace be made between the two kings, he may have another action for the same debt; and *Bracton*, 427, and *Stamf. Prerog. cap.* 12. fo. 32, do agree that this exception is but dilatory, but *Theoloall*, li. 1. cap. 6. fo. 10. doth affirm, that the aforesaid exception is peremptory, and shall not be revived by peace or league subsequent. Secondly, also, *quære* how a man ought aptly conclude this exception to the person, to be answered, as Littleton doth in this place unto the writ, or unto the action; for you shall see books and precedents of divers forms in *Theoloall* aforesaid.

Also, it is not to be omitted in this place, that an alien born may be made denizen in England, or naturalized, whereby he shall be enabled to purchase lands, or to acquire goods, or maintain any action, whereof you may read in 7 Co. 5, 6 a.

§ 199. The fourth, is a man who by judgment given against him upon a writ of *præmunire facias*, &c. is out of the king's protection. If he sue any action, and the tenant or defendant shew all the record against him, he may ask judgment if he shall be answered; for the law and the king's writs be the things by which a man is protected and helped; and so, during the time that a man in such case is out of the king's protection, he is out of help and protection by the king's law, or by the king's writ.

The fourth exception mentioned to the writ or action of the demandant, or plaintiff, is, against him that is attainted in a *præmunire*; [for such person (1)] is by express words out of the king's protection generally; and when in other subsequent statutes it is enacted, (as 27 E. 3. cap. 1. 16 R. 2. cap. 5.) that he who doth commit any offence therein expressed, shall incur the danger and penalty of *præmunire*, it is intended that he shall be out of the king's protection; and therefore he is not to be aided or protected by the king's laws, or by the writs of the king. See in *Sir John Davies' book*, 37 b. and in *i. b. and in 7 Co. 12 a.* And yet *nota*, this extendeth only to legal protection, as in this place you may perceive; for the parliament could not take away that protection which the law of nature giveth unto him; and therefore, notwithstanding that statute, the king may protect and pardon him; and though by the statute it was further enacted, that it should be done with him as with an enemy, by which words any man might have slain such a person, as it is holden in 24 H. 8. tit. *Coron. Bro. 196*, until statute made *anno 5 Eliz. cap. 1.* yet the king might protect and pardon him. 7 Co. 14 a. And it is observable, that the occasion and making of this first statute of *præmunire* was, to restrain

(1) The addition of these words, or others to the same effect, seems requisite to complete the sentence.—*Ed.*



innovations and provisions made by the pope, and secured by certain provisoes of bishopricks and other ecclesiastical livings, here in England, to the disinherison of the king and other patrons of their lawful titles of presentment; which purchased grants of the pope, and his reservations, were done with a clause of *anteferri*, whereby was meant a *præmonere* above the king, and was called the pope's law of *præmonere*, which were corruptly now called *præmunire*, and is barred by the statute. See, in the 50th year of Edward 3. notes upon a statute then made, in the margin, fo. 423.

Note, the pain and forfeiture in the case of *præmunire* is this: he shall forfeit his lands and tenements, which he hath in fee simple, for ever; and it was the case of Richard Farmer, of London, which see in *Brooke, tit. Forfeiture*, 101, and *Præmunire*, 19; but his lands in tail he shall forfeit but during his life, and all his goods and chattels he shall forfeit, and shall have perpetual imprisonment, and shall be out of the king's protection. *Crompton's Justice of Peace*, fo. 14 a. *Nota, Trudgin's case*, in 11 Co. 63 b, *accordat*.

§ 200. The fifth, is where a man is entered and professed in religion. If such a one sue an action, the tenant or defendant may shew, that such a one is entered into religion in such a place, into the order of St. Bennett, and is there a monk professed, or into the order of friars, minors, or preachers, and is there a brother professed, and so of other orders of religion, &c. and ask judgment if he shall be answered. And the cause is this: that when a man entereth into religion, and is professed, he is dead in the law, and his son, or next cousin incontinent shall inherit him, as well as though he were dead indeed. And when he entereth into religion, he may make his testament, and his executors; and they may have an action of debt due to him before his entry into religion, or any other action that executors may have, as if he were dead indeed. And if that he make no executors when he entereth into religion, then the ordinary may commit the administration of his goods to others, as if he were dead indeed.

The fifth is a man who is entered and professed in religion; this was the law in times of popery, but now it is antiquated; so there was a civil death by entry into religion, and a natural death by dissolution of the soul from the body. 1 Co. 84 a. See 2 Co. 48 b. And the civil death in this, and in many cases, is in the intendment of the law, as a natural death. In *Garranty*, 71 *Fitz.* the case was, if I be disseised, and my brother do release [with] warranty, and enter into religion, his warranty shall bind me, although he be still in natural life; for I shall have his lands by descent, and by consequence, &c.; and whereas the statute 31 E. 3. cap. 11. is in case when a man dieth intestate the ordinaries *façent deputer de plus prochains du mort intestat*, this word *mort* is largely to be understood, for it extends unto civil death, *scil.* unto entry into religion, as unto natural death. [9] Co. 40 a.

And in this place also the reason is alleged, for that when a man doth enter into religion, and is professed, he is dead in law, sect. 296, and his son or other cousin presently shall inherit, as if he were dead in deed, and he may make his executors, or in that default the ordinary may commit the administration of his goods; and of this civil death note *Bracton*, fo. 421, *competit exceptio tenenti ex personâ petentis peremptoria, propter mortem civilem, ut si quis se religioni contulerit, et postea ad sæculum reversus agere velit, et hæreditatem petere, non audietur. Cum semel quis se religioni contulerit, renunciat omnibus quæ sæculi sunt, habitâ distinctione, utrum habitum probationis suscepit, vel habitum professionis, &c. Vide Fitz. Non-ability*, 26, where it is holden, although a man or woman be never professed, yet if they do remain by a year and a day in the order, they shall be taken as professed, and not after to be deraigned.

And notwithstanding he may be discharged off from his obedience, yet he doth remain professed, and so a dead person in law, and none may dispense and discharge him from his profession, but only the supreme head of the church; but the archbishop by the licence of his sovereign may discharge him from his obedience. 34 H. 6, fo. 2. *Vide the like case in 14 H. 8. fo. 16.*

But there be certain limitations hereof, as in cases wherein doth issue judgment of death, as of murder, felony, or such like, or where he doth a thing of his own wrong, as battery, trespass, &c.; for in such cases his natural life is only considered. 14 H. 8. 16 b. For if the tenant in tail do alien, and enter into religion, the issue during his natural life hath not any remedy; for he cannot have a

formedon *quia habitum religionis assumpsit*, for that writ doth not lie but where one doth abate after the entry into religion: also, if tenant in tail do [ charge ] his land, and enter into religion, his issue shall hold the land charged during his natural life, and yet to divers intents the issue shall be adjudged in law, as if his father were dead in deed; for he shall have his voucher as heir, and if he be within age he shall have his age; and yet because the father might have aliened, and the alienation good during his life natural, by the same reason he may charge it, and the charge good during his natural life; also a man may have a formedon *in reverter quia habitum*, &c. upon an abatement, but not upon an alienation; for during his natural life the alienation was good, but no such writ in remainder doth lie. *Keilw.* 104 *a*.

And note, in divers cases the civil death is not equivalent unto a natural death, as after in Littleton may appear, sect. 410; for his entry into religion shall not be to the damage or prejudice of any other: and the wife of a husband who is entered into religion and professed, shall not be endowed during the life of her husband, the reason and cause thereof is, because upon her complaint he may be deraigned; and yet to some purposes the matrimony is dissolved, and she is in a manner a widow; for she may have an action in her own name: 14 *H.* 8. 17 *a*: and if a man and a woman do intermarry *et ante carnis copulam* the one or the other do enter into religion, by it the marriage is dissolved. *Ibidem*, 16 *b*.

If the grandfather enter into religion and is professed, his heir shall have a writ of aile if a stranger do abate, and the writ shall be general, and shall not make mention of the entry into religion, nor of the profession. *Fitz.* 221 *F. G*.

But if the tenant or defendant do allege, that the demandant or plaintiff did enter into religion, and was professed, it seemeth by Littleton it is not sufficient, unless he say also that the plaintiff is professed, and hereof see 1 *E.* 3. *pl.* 12. A man doth make a lease *habendum* to the lessee during his life, and doth not say his natural life, yet if such a lessee do enter into religion, and is professed, the lease is not ended, nor the lessor cannot enter. *Vide* 2 *Co.* 48 *b*. But in ancient time the law in this case hath been otherwise taken. *Ibidem.* See 5 *H.* 7. 25 *a*.

Of the beginning of this order of St. Bennett you may read at large in *Doctor Ridley*, (*fo.* 153) and all other orders of friars after him (*fo.* 181), and of them and of all the orders of friars, see the catalogue in *Fox's Monuments*, 259, 260.

§ 201. The sixth is, where a man is excommunicated by the law of holy church, and he sueth an action real or personal, the tenant or defendant may plead, that he, that sueth, is excommunicated, and of this it behoves him to shew the bishop's letters under his seal, witnessing the excommunication, and ask judgment, if he shall be answered, &c. But in this case, if the demandant or plaintiff cannot deny it, the writ shall not abate, but the judgment shall be, that the tenant or defendant shall go quit without day, for this, that when the demandant or plaintiff hath purchased his letters of absolution, and shewed them to the court, he may have a resumption, or a re-attachment, upon his original, after the nature of his writ. But in the other five cases the writ shall abate, &c. if the matter shewed may not be gainsaid.

There is also one other obstacle, which for the time doth restrain a man to proceed in his actions, till he have a lawful absolution, *scilicet* excommunication; whereof *Bracton*, fo. 415, cap. 18, writeth, in this manner: *idem competit tenenti exceptio propter lepram animæ petentis, ut si fuerit excommunicatus nominatim, sed non in genere, quia sicut lepra esse poterit in corpore, ita et in animâ, et sicut leproso interdicitur communio gentium, sic et excommunicatio, et quod plus est, omnis actus legitimus*; and with this doth agree *Britton*, cap. 49, fo. 125.

In this exception because of excommunication, the defendant must thereof shew forth the letters of the bishop under seal, testifying the excommunication: 9 Co. 40, 41: and in times of vacation, &c. that the archdeacon of Richmond and the dean and chapter of Canterbury may certify excommunication, and shall be allowed. *Vide* 7 E. 4. 14. 8 H. 6. 3. But if the bishop or his commissary be defendant and party, his certificate in that case shall be no impediment, but that the plaintiff or demandant may proceed; *vide Theloall*, li. 4. cap. 13; and therefore it hath been resolved, that the judges of the common law shall judge upon the manner, and in some cases of the matter also of the certificate, in case of excommunication. 8 Co. 68 b. The form of a certificate of excommunication must be generally directed, that is to say, *omnibus Christi fidelibus*, or unto the justices, &c.; for if it be directed unto the king, or unto the chancellor, in this case for disabling

him to sue, it is not sufficient. 2 E. 4. 4. But if a *significavit* be, it is good, if it be directed unto the king or to the chancellor. 20 H. 6. fo. 25.

The last thing in this case expressed is, that the writ of the plaintiff excommunicated shall not abate, but his suit shall be put without day until he be absolved, and the entry is *remaneat loquela sine die quousque*. Finch, li. 4. cap. 7. fol. 141. 8 Co. 69, *accordat*.

And all that in this section is said of the exception, because of the excommunication, is to be understood, when such a plaintiff or demandant doth sue in his own right; for such an exception doth not lie against an executor, that is excommunicated, no more than against an outlaw. *Vide ante, sect. 191.*

§ 202. Also, if a villein be made a secular chaplain, yet his lord may seise him as his villein, and seise his goods, &c. But it seemeth, that if the villein enter into religion, and is professed, that the lord may not take nor seise him, because he is dead in law; no more than if a free man taketh a nief to his wife, the lord cannot take nor seise the wife of the husband, but his remedy is to have an action against the husband, for that he took his neif to wife without his licence and will, &c. And so may the lord have an action against the sovereign of the house, which taketh and admitteth his villein to be professed in the same house, without the licence and leave of the lord, and he shall recover his damages to the value of the villein. For he which is professed a monk, shall be a monk, and as a monk shall be taken for term of his natural life, unless he be deraigned by the law of holy church. And he is bound by his religion to keep his cloister, &c. And if the lord might take him out of his house, then he should not live as a dead person, nor according to his religion, which should be inconvenient, &c.

This place doth shew that there be two divers sorts of ecclesiastical persons, or chaplains; the one secular, the other of regular; (see before, sect. 133): and such, because they are most specially deputed and dedicated to the service of God, are called spiritual

men, as by an excellency; *Doct. et Stud. fo. 6 a*; and in respect of the subject-matter of their profession, which is spiritual. *Doctor Cosins' Apology, 235.*

Seculars are they, who though they walk in the way of God to be lanthorns and guides unto worldly men, and are most proper for the conducting of secular and laymens' consciences, yet they have not in such form, and by such rules, entered into their profession, and religion, as the others; *Finch, 138 b*; and therefore are not in the eye of the law dead men unto the world, as the others are. *Vide Dr. Cowell's Inst. fo. 13.*

The consequence is, if a villein be made a priest, yet nevertheless his lord may seize him as his villein, &c. as he might before; for by his ecclesiastical function the base blood that was in him is not done away; *vide 4 E. 4. 25 a, by Danby*; and with our author in this point the *Doctor et Student* doth agree; (*li. 2. cap. 43. fo. 140 a*) and there it is said, in this case the lord may order him so, that he shall do him such service as a priest ought to do, before any other, but he may not put him to labour, nor other business, that is [not] honest and lawful for a priest to do; and it seemeth reasonable it should be so; for the law will not permit any thing to be done which is *contra bonos mores*, or which is *indecorum*. Although by this case it appeareth, that dignity of secular priesthood doth not amount to a manumission in our law, yet it seemeth if a villein be made a knight, he is by that degree made a free-man; *Glanville, lib. 5. cap. 5. in fine, and Bracton, lib. 4. fo. 198 b*; for it cannot stand with the dignity of a knight to be a bondman; but if he be made a gentleman, or an esquire, he doth still remain a villein; and in France it was adjudged anciently, that where the lord of his villein had knighted his villein, having lawful commission so to do, he became and had the honor lawfully; but if the king, or any other lord, knighted him, nothing had been wrought by it; for none could manumit him but his lord. *Selden, 318, in his Titles of Honor.*

But it is said in this place, if a villein do enter into religion, and be professed, the lord cannot take nor seize his body, nor put him to any manner of labour, because he is a dead man in law, and herewith doth agree *Doct. et Stud. li. 2. cap. 43. fo. 140 b*. And in that case he must abide in his religion, under the obedience of his superior, as other religious persons do, that be bondmen; and the lord hath no remedy in that case for loss of his bondman, but only to take an action of trespass against him that received him into

religion without licence, and thereupon to recover damages to the value of the villein, as shall be assessed by twelve men; for he that is professed a monk shall be a monk, and as a monk shall be taken for the term of his natural life, unless he be deraigned by the law of the holy church; and concerning deraignment, *vide* 44 H. 8. fo. 16, 17.

And note this cause, if a villein professed is compared to the case when a free-man doth take a neif to his wife, the lord may not take or seize the wife from her husband; by which last words it seemeth, that Littleton did understand, that after the marriage dissolved he might seize her, and that she was not enfranchised absolutely by that marriage, of which matter there have been divers opinions in our books (1); *which see in sect. 187, in fine*; and note how the common law doth incline to the rules and constructions of the church; and of this matter see *sect. 20. and sect. 400.*

§ 203. In the same manner it is, if there be a guardian in chivalry of the body and land of an infant within age, if the infant, when he comes to the age of fourteen years, entereth into religion, and is professed, the guardian hath no other remedy (as to the wardship of the body) but a writ of ravishment *de gard* against the sovereign of the house. And if any, being of full age, who is cousin and heir of the infant, entereth into the land, the guardian hath no remedy as to the wardship of the land, for that the entry of the heir of the infant is lawful in such case.

Littleton in this place doth proceed with more cases and examples to prove the force of ecclesiastical profession. If a man by reason of his seignory have the wardship of the body and of the land of an infant, and the infant when he cometh to the age of fourteen years, do enter into religion, and is professed, the lord or guardian hath no remedy (as unto the body) but a writ of ravish-

(1) Lord Coke observes, that "the better opinion of our books is, that she shall be privileged during the coverture only, unless the lord himself marrieth the

nief, and then some hold that she shall be free for ever." And see Co. Lit. 123 a, n. 3.—*Ed.*

ment *de gard*, against the sovereign of the house or monastery; which writ [is given] by the statute of Merton (1), cap. 6; but at the common law he might in this case, and in all other like, have had an action of trespass fully to the same effect, save that by this statute the ravisher shall be imprisoned. And in *Keilw. fo. 185. pl. 86*, the question was, if a man have issue two sons, the eldest entereth into religion, and, the youngest being within age, the father dieth, seised of certain lands holden by knight's service; and after the youngest son is ravished, and the lord doth bring a writ of ravishment of ward, and hanging the writ the eldest is deraigned, whether the writ shall abate or no. *Vide librum.*

And Littleton also saith, that the lord in this case hath lost the wardship of the land, if the next heir be of full age; and a doubt hath been made in this concerning the land, (the reason and arguments on both parts read in *Keilw. fo. 112. pl. 39*); but the law is with Littleton, and by the reason made by him. *Vide* in this case 11 H. 4. *fo. 32 a*; if friars do take a man's son, or his servant, into their cloister against the will of their parents, or master, and put them in their house, and clothe them with their habit, and he or they be above the age of fourteen years, and be professed, the father or the master cannot seize him again; but if he be under fourteen years of age he cannot be professed, and in that case the lord may take his son, or the master his servant, with all their apparel, or friar's habit: as if a man do take away my wife, and put her into costly apparel, the husband may take her and all her furniture (2).

§ 204. Also, in many and divers cases, the lord may make manumission and enfranchisement to his villein. Manumission is properly, when the lord makes a deed to his villein to enfranchise him by this word (*manumittere*), which is the same as to put him out of the hands and power of another. And for that, that by such deed the villein is put out of the hands and out of the power of his lord, it is called manumission. And so every manner of enfranchisement made to a villein may be said to be a manumission.

(1) Lord Coke says, "this writ is given by the statute of W. 2. cap. 35, in *verbis* *conceptis.*" Co. Lit. 136 b.—Ed.

(2) See Co. Lit. 137 a.—Ed.



Now the author speaketh of enfranchising villeins, which may be done by divers and many means, more than in this book is mentioned: for the law doth favor liberty, and doth dislike much of bondage, as a thing against nature, howsoever it is become to be in force of a law *jure gentium*, as before is said; *servi postquam libertate donantur dicuntur manumissi, quasi de manu dimissi*: Doctor Cowell's *Institutes*, fo. 7; and he saith, *manumissio fit duobus modis expressè nimirum, vel implicite et tacite. Expressa manumissio item duplex est, una quæ scripto fit, ut cum dominus cartam vel instrumentum manumissionis servo suo dederit; altera quæ facto fit, priscis usitatio; ut cum dominus, vicinis suis præsentibus, villanum suum capite susceperit, dixeritque, "volo ut hic liber esto," atque hoc dicto illum è manibus suis dimissum protruserit. Vide librum.*

§ 205. Also, if the lord maketh to his villein an obligation of a certain sum of money, or granteth to him by his deed an annuity, or lets to him by his deed lands or tenements for term of years, the villein is enfranchised.

As this is a plain and full manumission, so by other means a villein may be enfranchised; as if the lord will become debtor to his villein by obligation or other writing, or do grant unto him an annuity, or will make a lease to him of lands or tenements by his deed. *Quære* if such lease be by poll (1).

§ 206. Also, if the lord maketh a feoffment to his villein of any lands or tenements, by deed or without deed, in fee simple, fee tail, or for term of life or years, and delivereth to him seisin, this is an enfranchisement.

Also, if the lord make a feoffment unto him of any estate of frank-tenement, by deed or without deed, and make livery, or do convey it otherwise unto him by fine, indenture of bargain and sale,

(1) Lord Coke says, "and albeit the lease be made to the villein without deed, yet it is an enfranchisement for ever." Co. Lit. 137 b.—Ed.

or by way of use [it is an enfranchisement]: *per* Wilby, if the lord enfeoff his villein without deed, it is no enfranchisement: 24 E. 3. fo. 32: which opinion is contrary to Littleton, and against the law, for the feoffment is good without deed, by the livery.

§ 207. But if the lord maketh to him a lease of lands or tenements, to hold at will of the lord, by deed or without deed, this is no enfranchisement; for that, that he hath no manner of certainty or surety of his estate, but the lord may oust him when he will.

But if the lord do make unto him a lease, &c. to hold at the will of the lord, this is no enfranchisement, whether such lease be made by deed or without deed.

§ 208. Also, if the lord sueth against his villein a *præcipe quodd reddat*, if he recover, or be nonsuit after appearance, this is a manumission, for that he might lawfully have entered into the land without suit. In the same manner it is, if he sue against his villein an action of debt or account, or of covenant, or of trespass, or of such like, this is an enfranchisement, for that he might imprison the villein, and take his goods without such suit. But if the lord sue his villein by appeal of felony, where he was indicted of the same before, this shall not enfranchise the villein, albeit that the matter of appeal be found against the lord, for that the law could not have the villein to be hanged without such suit. But if the villein were not indicted of the same felony before the appeal sued against him, and afterwards is acquitted of this felony, so as he recover damages against his lord for the false appeal, then the villein is enfranchised, because of the judgment of damages to be given unto him against his lord. And many other cases and matters there be, by which a villein may be enfranchised against his lord, &c. But inquire of them.

If the lord sue against his villein, a *præcipe quòd reddat*, if he do recover, or be nonsuited after appearance, this is a manumission; *à fortiori* if he bar; and the reason is, because he might have entered into the land lawfully without such suit; *inutilis labor stultus*: 5 Co. 89 a. But if tenant in tail of a manor, to which a villein is regardant, do alien the manor unto the villein, and die, the issue in tail doth recover the land against the villein, he is not thereby enfranchised; for he had no other means to recover his inheritance but the action. 21 E. 3 (1). If he sue against his villein an action of debt, or account, or of covenant, or trespass, or such like, it is an enfranchisement.

But if the lord do sue his villein by appeal of felony, whereof he was indicted before at the king's suit, this doth not enfranchise the villein, although the matter of the appeal be found against the lord; the reason hereof is, because if he had been guilty, the lord had no other means to have had him hanged but by that suit; though upon his attainder upon the king's suit he might peradventure be put to execution.

But in case the villein be not indicted, and upon the appeal the defendant is acquitted of felony, so that the villein doth recover damages against his lord for the false appeal (for in the first case he shall not recover damages) then the villein is enfranchised by the judgment aforesaid.

And so by the way note a policy in practice in this case, first, to procure an indictment against him for the king, and afterwards to pursue his appeal; it is good to be wary in such proceedings, for *eventus legis est res incertissima*; and by the same means any appellant may prevent the person appealed from his election of trial by battle, for the vehement presumption that the indictment is true, being found by the oath of twelve lawful men of the county.

And many other cases and matters there be, by which a villein may be enfranchised; *sed de illis quare, et hoc* in Ashe's new Table in the title of Villenage: by King James's laws, if a villein work one Sunday by his lord's commands, he shall be free. See in [Drayton's] *Poliollion*, 302.

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§ 209. Also, if the lord of a manor will prescribe, that there hath been a custom within his manor time out of mind of man, that

(1) Lord Coke cites this case, and adds, "the reason is, for that he could not seize the villein till he had recovered the manor, which was the principal, and at the time of the writ brought, he was no villein."—Co. Lit. 138 b.—Ed.

every tenant within the same manor, who marrieth his daughter to any man without licence of the lord of the manor, shall make fine, and have made fine to the lord of the manor for the time being, this prescription is void. For none ought to make such fine but only villeins. For every free man may freely marry his daughter to whom it pleaseth him and his daughter. And for that this prescription is against reason, such prescription is void.

Read before, *sect.* 174, and *quare* if the law do so judge of such custom or prescription, as Littleton declareth; for I have heard say, that the same custom is in many places; *vide* the books in Ashe's Table, *tit. Custom*, 11. 43 *E.* 3. 5. and *Kitch. fo.* 104 *b*, do agree that this custom and prescription is good (1), contrary to Littleton: but it seemeth that Sir John Fortescue, *fo.* 32 *b*, who did last write of this point, was of opinion, that such custom is void; for customs without foundation of reason, are void; where-[of] some examples are in 5 *H.* 7. *fo.* 9 *b*.

§ 210. But in the county of Kent, where lands and tenements are holden in gavelkind, there, where, by the custom and use out of mind of man, the issues male ought equally to inherit, this custom is allowable, because it standeth with some reason; for every son is as great a gentleman as the eldest son is, and perchance will grow to greater honor and valor, if he hath any thing by his ancestors, or otherwise peradventure he would not increase so much, &c.

Concerning the whole discourse of this custom of gavelkind, read in *Lambert's Perambulation of Kent*. The reason which is made here in approbation of this custom is, because every one of the sons is as great a gentleman as the eldest son is, and peradventure may prove to be of greater honor and valor, if he may have somewhat from his ancestor; whereas otherwise, without such foundation, he should not be able to increase, and they being alike dear to their

(1) But see Co. Lit. 140 *a*.—*Ed.*

common ancestor, from whom they claim, have so much the more need of their friends help, as through minority they be less able to help themselves than the elder brother.

Others [say] this custom is partly grounded upon a natural consideration; for that all the sons hold the like obligation of nature, and desert with their parents, in which they have an equal interest; and [it was] also suffered to take place in Kent, and in other places of this land in those days most inclinable to rebellion, to the intent to enfeeble their forces, and to bring their great houses and families to impuissance and decay, thereby to disable and discourage them from such unlawful and violent attempts. *Customs of London, fo. 9.* More of gavelkind, *see sect. 265.*

§ 211. Also, where by the custom called borough English, in some borough, the youngest son shall inherit all the tenements, &c. this custom also stands with some certain reason; because that the younger son (if he lack father and mother) because of his younger age, may least of all his brethren help himself, &c.

Of this custom of borough English, *see the sect. 165.*

§ 212. But if a man will prescribe, that if any cattle were upon the demesnes of the manor there doing damage, that the lord of the manor for the time being hath used to distrain them, and the distress to retain till fine were made to him for the damages at his will, this prescription is void; because it is against reason, that if wrong be done any man, that he thereof should be his own judge; for by such way, if he had damages but to the value of an halfpenny, he might assess and have therefore one hundred pounds, which should be against reason. And so such prescription, or any other prescription used, if it be against reason, this ought not, nor will not, be allowed before judges; *quia malus usus abolendus est.*

The author in these latter sections shewing his opinion concerning some customs and prescriptions, concludeth his chapter with this,

that no prescription is good in law in any case, by which custom a man may be his own judge in his own case, and accordingly this case hath been ruled as it is said 5 *H. 7. fo. 9 b, quia aliquis non debet esse judex in propria causa*: 8 *Co. 118 a*, and see in *Sir John Davies, fo. 32 b. 33 a*: this case and divers other manner for unreasonable customs; and yet it is in common experience, that copyholders have by the custom of the manor holden their customary lands at the will of their lords; but of this last matter touching the uncertain fines of copyholders, note in 4 *Co. 27 b*, and in 11 *Co. 44*.

## LIB. II. CAP. XII.—RENTS.

§ 213. Three manner of rents there be, that is to say, rent-service, rent-charge, and rent-seck. Rent-service, is, where the tenant holdeth his land of his lord by fealty and certain rent, or by homage, fealty, and certain rent, or by other services and certain rent. And if rent-service at any day, that it ought to be paid, be behind, the lord may distrain for that of common right.

This Second Book, concerning the several services by which lands and tenements are holden, the author doth conclude with this chapter of rents, shewing that there are three manner of rents; that is to say, rent-service, rent-charge, and rent-seck: and in ancient times the rent reserved upon tenures or demises was called *redditus* (1), because the lord or lessor did live by it. 10 *Co. 107 a*.

Littleton saith (sect. 222) that rents do issue out of lands; therefore it is to be observed, that which issueth out of land, or the profits of land, are of three sorts, natural, industrial, and artificial: the natural profits of land are such as do by the force and benefit of nature principally, and not by the diligence and labour of man, as apples, herbs, trees, and such like; industrial profits are such as do principally require the diligence and culture of man, which, unless it be continually applied, *natura nihil operatur*, as corn, hops, wood, saffron, and such like; artificial profits are those which are

(1) The Report says, it was therefore their derivation of the word may be called *civis redditus*; though perhaps either thought equally logical and classical—Ed.

reserved, granted, or issuing out of land by the act of man, and the approbation of law, as a common of pasture, a warren, a rent, and things of like sort. *Fulbeck's Direction*. And in 10 *Co. fo.* 128, it is said, that rent reserved is to be raised of the profits of the land, and is not due till the profits be taken by the lessee; for the words *reddendo inde* or *reservando inde* is as much as to say, that the lessee shall pay so much of the issues and profits at such days to the lessor; for *reddere inde nihil aliud est quam acceptum reddere, et redditus dicitur à redeundo quia retrò it, scilicet* to the lessor, donor, &c., *sicut proventus a proveniendo, et obventus ab obvenièdo*.

Littleton doth first speak of rent-service, which is, where there is a lord and tenant in fee simple, and the tenant doth hold his land of his lord amongst his other tenures, which at the first were created, by a certain rent also; for the tenure and the reservation do make that rent to be a rent-service; but here must be remembered which before is taught, sections 118. and 216. that a tenure may be *per fidelitatem tantum*, and by like reason, by homage, by fealty, or by any like service, without any reservation of rent; [for rent] is not of the substance of the tenure, or of any other grant or demise; for it may consist without rent. 5 *Co.* 55*a*. And if a rent-service be at any time behind, in which it ought to be paid, the lord may distrain for it of common right, although no distress was mentioned in the first creation of the tenure; and the reason is, because the rent was certain, which was reserved: *vide sect.* 137; and the rent was reserved for the land.

§ 214. And if a man will give lands or tenements to another in the tail, yielding to him certain rent by the year, he of common right may distrain for the rent behind, though that such gift was made without deed, because that such rent is rent-service. In the same manner it is, if a lease be made to a man for life, or the life of another, rendering to the lessor certain rent, or for term of years rendering rent.

The precedent case is of a rent-service, by reason only of the reservation upon the tenure, although the lord hath not the reservation of the tenancy. And now the author sheweth another manner

of rent-service, that is, where the gift is made in tail, for life, or for years, reserving a rent; in all which cases the donor or lessor hath a reversion in him, he of common right may distrain for the rent behind, though such a gift or lease be made without deed, because such rent is rent-service; in which cases the form and manner of the reservation of the rent-service is warily to be observed; and the words "he reserving unto him a certain rent," by which the donor or lessor hath a rent-service to himself; but by these words the heir of the donor hath no title to the rent, as incident to the reversion; for it is said by Kingsmill, in 21 H. 7. 25*b*, if in all those cases the reservation of the rent be general, without more saying, the law shall direct that he and his heirs shall have it; but when he saith expressly "reserving unto him," the law will not aid him beyond that those words do extend; and therefore in 10 E. 4. 14*b*. the law is taken, that if such a gift or lease be made of two acres, reserving unto him and his heirs 12*d*. for one acre, and reserving unto him 12*d*. for the other, that his heirs shall not have the 12*d*. last reserved, because it was not reserved to him and his heirs. *Vide Plowd.* 171. 27 H. 8. 18*a*. 5 Co. 112*a*.

And in this section is observable, that an estate in fee simple, or for life, may be made without deed, or other instrument, because it taketh effect by virtue of livery without deed; and yet the words of the statute Westm. 2. cap. 1. *quod voluntas donatoris secundum formam in charta doni sui manifestè expressa de cætero observetur.* *Vide* 3 Co. 8*b*. *antea*, sect. 59.

§ 215. But in such case, where a man upon such a gift or lease will reserve to him a rent-service, it behoveth, that the reversion of the lands and tenements be in the donor or lessor. For if a man will make a feoffment in fee, or will give lands in tail, the remainder over in fee simple, without deed, reserving to him a certain rent, this reservation is void, for that no reversion remains in the donor, and such tenant holds his land immediately of the lord, of whom his donor held, &c.

§ 216. And this is by force of the statute of *quia emptores terrarum*. For before that statute, if a man had made a feoffment in fee simple, by deed or without deed, yielding to him and to his heirs a certain rent, this was a rent-service, and for this he might



have distrained of common right; and if there were no reservation of any rent, nor of any service, yet the feoffee held of the feoffor by the same service, as the feoffor did hold over of his lord next paramount.

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In this place is observable, that in case when such a rent-service is reserved, it is necessary that the donor or lessor have the reversion of those lands; for if a man do make a feoffment in fee, or give lands in tail, the remainder over in fee simple, without deed, reserving a certain rent, such a reservation is void, (*scilicet*) merely as a rent by the reservation; but if in that case the reservation of the rent be by deed, the deed indented doth make the rent good, as hereafter may appear. 5 H. 7. 5b. *Brian*.

And nevertheless it seemeth by that is here said, that as to a remainder, it may well enough depend upon a frank-tenement without deed; and before, sect. 60. it is shewed, that any remainder may depend upon a lease for years without deed.

For when a feoffment in fee is made, or when tenant in tail is, the remainder over in fee simple without deed, the tenant now at this day doth hold the land not of his donor or lessor, but immediately of the lord next paramount; but this is by force of the statute of *quia emptores terrarum*, otherwise called the statute of Westm. 3. enacted anno 18 E. 1. for before the said statute, if a man had made a feoffment in fee simple by deed, or without deed, reserving unto him and to his heirs a certain rent, this was a rent-service, because of the tenure between the feoffor and the feoffee, and for it he might distrain of common right; and if no reservation were of any rent, or of any service, then the feoffee did hold of the feoffor by the same service that the feoffor did hold over of his lord next paramount.

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§ 217. But if a man, by deed indented, at this day maketh such a gift in fee tail, the remainder over in fee; or a lease for life, the remainder over in fee; or a feoffment in fee; and by the same indenture he reserveth to him and to his heirs a certain rent, and that if the rent be behind, that it shall be lawful for him and his heirs to distrain, &c. such a rent is a rent-charge; because such lands or tenements are charged with such distress by force of the writing

only, and not of common right. And if such a man, upon a deed indented, reserve to him and to his heirs a certain rent, without any such clause put in the deed, that he may distrain, then such rent is rent-seck; for that he cannot come to have the rent, if it be denied, by way of distress; and if in this case he were never seised of the rent, he is without remedy, as shall be said hereafter.

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Now the author doth descend to the other rents, according to the division aforesaid; a rent-charge may be reserved, although he to whom the reservation is made hath not the reversion of the lands or tenements out of which the rent-charge is to issue; but then such rent-charge must be by deed indented; and therein must also be expressed, that if the rent be behind it shall be lawful to him and his heirs to distrain, &c.; for if in the indenture there be no clause of distress, then is the rent reserved but a rent-seck, for which there is no remedy, if he never was seised of the rent, as hereafter followeth.

In *Plowden*, 134, it is hereupon observed, that the words of an indenture are the words of every party, and therefore shall not be taken strongly against the one, and beneficial to the other; as in this case the rent cannot be reserved as that rent upon a lease for life, for years, or in tail, because the reversion is not in the feoffor; and yet the feoffor shall have it as a rent granted by the feoffee.

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§ 218. Also, if a man seised of certain land, grant, by a deed poll, or by indenture, a yearly rent to be issuing out of the same land, to another in fee, or in fee tail, or for term of life, &c. with a clause of distress, &c. then this is a rent-charge; and if the grant be without clause of distress, then it is a rent-seck. And note, that rent-seck *idem est quod redditus siccus*; for that no distress is incident unto it.

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As there are two manners of rent-service, so a rent-charge may be two ways, *scilicet*, by deed indented, or by deed poll; [as if land be granted] by indenture, a yearly rent issuing out of the same land to another, &c. with clause of distress, then this is a rent-

charge; and if the grant be without clause of distress, then it is a rent-seck; and note that a rent-seck *idem est quòd redditus siccus*, because no distress is incident to it: and see 6 Co. *redditus siccus et cæcus* (fo. 58.) in case where a rent is devised to a man, it is by creation *redditus siccus*, barren, without fruit, and for this dryness is compared unto a stone; *summa petit scopuli, siccdque in rupe resedit*: it is *redditus cæcus et siccus*, for it is a rent remediless, which cannot see any remedy or way to attain to it.

And yet in special cases a man may distrain for a rent-seck of common right: *Keilw.* 104, pl. 11. 7 Co. 2 pt. 24. *Vide sect. 227. see sect. 233.*

§ 219. Also, if a man grant by his deed a rent-charge to another, and the rent is behind, the grantee may choose, whether he will sue a writ of annuity for this, against the grantor, or distrain for the rent behind, and the distress detain until he be paid. But he cannot do, or have, both together, &c. For if he recovers by a writ of annuity, then the land is discharged of the distress, &c. And if he doth not sue a writ of annuity, but distrain for the arrearages, and the tenant sueth his replevin, and then the grantee avow the taking of the distress in the land in a court of record, then is the land charged, and the person of the grantor discharged of the action of annuity.

If a man do grant by his deed a rent-charge unto another, and the rent is behind, the grantee hath election to recover by writ of annuity against the grantor, or to distrain: by the first to discharge his lands (1): *vide in 7 Co. 24a. in case de rent-charge; et tamen le grantee ne poet aver briefe de annuetic. vide in Finch, 49, accordat.*

But he cannot have both remedies. *Fitz. N. B. 153 A, accordat. Nemo debet bis vexari, si constet curiæ quod sit pro unâ et eâdem causâ.* 5 Co. 61. And note when but one thing doth pass to the grantee or donee *ut hic*, and the grantee or donee hath election in

(1) There appears to be some error in the MS. in this passage: it is however clearly the point in Littleton, expressed only in different words; and therefore the error is of less importance.—Ed.

what manner or degree he will take it, there the interest doth pass by [and by], and the party, his heirs, or executors, may make election when they will. But in cases where two things are granted to a man disjunctively, nothing doth pass to him before election; [for election] must be precedent, and before election he cannot assign over any of them; but in the other case the election may be subsequent. Note in 2 Co. 36 a. *et seq.* good diversities touching election (1). But if a man by his deed do grant a rent-charge to one and his heirs, and do not say for him and his heirs; in this case it is no policy for the grantee to make his election by a recovery in a writ of annuity; for it shall bind the grantor only during his life, and his heir is not expressly bound as he is to the rent-charge; also, in this case if the grantor die before the election made by the grantee, his election is gone as to make it an annuity: *causa patet*.

*Vide Dyer*, 334, a rent-charge granted without words *pro se et hæredibus*; the grantee brought a writ of annuity against the heir, and had judgment to recover, yet he shall distrain afterwards; for the heir was never chargeable, so that upon the matter was no election at all. 10 Co. 128. *Finch*, 17 b. *Vide in 4 Co. 49 a. b. bon case*.

Concerning the construction of this section, I mind to set down certain cases within my reading, but the text is plain; and I do willingly pass over the reciting thereof (2).

§ 220. Also, if a man would that another should have a rent-charge issuing out of his land, but would not that his person be charged in any manner by a writ of annuity, then he may have such a clause in the end of his deed: *Provided always, that this present writing, nor any thing therein specified, shall any way extend to charge my person by a writ or an action of annuity, but only to charge my lands and tenements with the yearly rent aforesaid, &c.* Then the land is charged, and the person of the grantor discharged.

(1) See Co. Lit. 145 a.—Ed.

(2) The above passage is placed in the MS. immediately after "Sect. 219:" but would seem to relate only to the latter part of that section, of which the com-

mentator takes no other notice. The remarks which I have placed after section 219, certainly cannot have been intended to follow the 218th, which they do, in the MS.—Ed.

Although this word "proviso" is a special apt word to make conditions, (as in sect. 329. appeareth); yet, when the word "proviso" doth depend upon another sentence, or hath reference unto another part of the deed, then it doth not make a condition, but is only a qualification or limitation of the sentence, and other part of the deed to which it referred *ut hic; et inde nota 2 Co. 72a.* Also, the proviso may be, that it is only to shew the agreement, and is but as a covenant, and no condition, if it be not annexed to the estate or thing given; as in *Dyer, 222a.*

If a man, having nothing in Blackacre, doth grant unto me a rent-charge issuing out of Blackacre, *proviso* or *sub conditione* that I shall not charge the person of the grantor, this is a void proviso, condition, or limitation; for if it should be good, the grant then should be void, and of none effect, but be repugnant. *Perk. 121. Benignæ faciendæ sunt interpretationes cartarum propter simplicitatem laicorum ut res magis valeat quam pereat. 5 Co. 55.* If a man grant a rent by deed out of certain lands without clause of distress, this as to the charge of the land is remediless; but the grantee may charge the person of the grantor by writ of annuity; and therefore in this case, if the grantor do add a proviso, that he shall not charge his person, this is void, unless he deliver unto him seisin upon the delivery of the deed; else such proviso would take away from the grantee all his means and remedy; and therefore it is observable, that Littleton doth put this case, of a rent-charge, in which might be such a proviso lawfully; for the grantee was not bereaved of all his remedy. *6 Co. 58b. Vide 10 H. 7. 8a.*

By this case also we see, that a proviso which is good at the beginning, by consequence may become void, and repugnant; as if one by his deed do grant a rent-charge for life, proviso that he shall not charge his person, that is a good proviso; and yet if the rent be behind, and the grantee die, his executors shall charge the person of the grantor in action of debt, for otherwise he should be without remedy; and therefore now it is become repugnant and by consequence void (1). *6 Co. 41b. Dyer, 227b.*

And if peradventure the reader be desirous to know what diversities be between an annuity and a rent, I do refer him to the *Doctor & Student (lib. 1. cap. 19.)* and to *Andrew Ognell's case, in 4 Co. 49.* and in *Sir John Davies' book, fo. 5. et seq. vide 7 Co. 39b.*

(1) See Co. Lit. 146b.—Ed.

§ 221. Also, if one make a deed in this manner, that if A. of B. be not yearly paid at the feast of Christmas for term of his life 20*s.* of lawful money, that then it shall be lawful for the said A. of B. to distrain for this in the manor of F. &c. this is a good rent-charge; because the manor is charged with the rent by way of distress; and yet the person of him, which makes such deed, is discharged in this case of an action of annuity, because he doth not grant by his deed any annuity to the said A. of B. but granteth only, that he may distrain for such annuity, &c.

Note, if I do grant to you, [that you] and your heirs shall distrain for a rent of 40*s.* within my manor of S., this by construction of law shall amount to a grant of a rent, out of my manor of S.; for if it shall not amount to a grant of a rent, the grant should be of little force or effect, if the grantee should have but a bare distress, and no rent in him; for then he should never have an assize of it, &c.; and this is the reason wherefore it hath been [ruled, that it shall amount to] a rent by construction of law, *ut res magis valeat*: and in this case the grantee shall not have a writ of annuity (1). 7 Co. 24*a.*

But when one doth grant [a rent] out of the manor of Dale, and doth grant further that if the rent be behind, the grantee may distrain for the same rent in the manor of Sale, this is only but a penalty in the manor of Sale for three causes, which you may read at large in the books (2).

§ 222. Also, if a man hath a rent-charge to him and to his heirs issuing out of certain land, if he purchase any parcel of this to him and to his heirs, all the rent-charge is extinct, and the annuity also; because the rent-charge cannot by such manner be apportioned. But if a man, which hath a rent-service, purchase parcel of the land out of which the rent is issuing, this shall not extinguish all,

(1) See Co. Lit. 147 *a.*—*Ed.*

(2) See 7 Co. 24*a.*—*Ed.*

but for the parcel. For a rent-service in such case may be apportioned according to the value of the land. But if one holdeth his land of his lord by the service to render to his lord yearly at such a feast, a horse, a golden spear, or a clove, gilliflower, and such like; if in this case the lord purchase parcel of the land, such service is taken away; because such service cannot be severed nor apportioned.

Rent-charge is not of common right, that is, hath not his creation by the operation of the law, as a rent-service hath; but only by the act of the party; and therefore it is not favored in the law: *Doct. & Stud. lib. 2. cap. 16*: the consequence is, if a man have a rent-charge to him and his heirs issuing out of certain lands, and he doth purchase any parcel of that land to him and to his heirs, so that he hath as great estate in the one part of the land charged, as he hath in the rent, all the rent-charge, and in the lands, any lesser estate than the rent-charge, is suspended for the time only, and the law doth impute it to the wilfulness or gross ignorance of the purchaser. 6<sup>Co.</sup> 39, *Henry Fynche's case. vide 9 Co. 135.*

And yet if I do acknowledge statute merchant, or of the staple, to you; whereby all my land is liable to execution, and afterwards you do purchase parcel, yet your rent is not thereby extinct; but you may take your execution upon my body, or upon the rest of my lands in my hands. 13 *H. 7. 22a. Piper's case.*

But it seemeth our author's opinion was, that not only the rent-charge was extinct, but the election to have a writ of annuity; *quære legem*: unless peradventure his case be only of such a rent-charge as was without election, whereof before some examples be. And of extinguishment and apportioning, see in *Sir John Davies' book, fo. 4b. 5a.*

But a rent-service regularly may be apportioned, notwithstanding the lord or he in the reversion do purchase parcel of the land; and according as the diversity is between a rent-charge and a rent-service, so it is between common appendant, which is of common right, and common appurtenant; which see in *Tyrringham's case*, in 4 *Co. 38a. et vide tamen* in 8 *Co. 79a.* an especial case, where a common appurtenant may be apportioned.

And yet this section is concluded with a special case, that a yearly entire rent-service is extinct, and shall not be apportioned by the

purchase of the lord of any part of the tenancy; whereof there are two reasons, 1. because in this case, as you see, the rent-service is entire, which in parts *dividi nequeunt*: 2. because it was his own act, and therefore is in the same manner, as if he had released his seignory in one part of the tenancy, thereby all his seignory is gone. And therefore a diversity is taken in 6 *Co. fo. 1 b.* between this case, which is the act of the lord, and where by the tenant a severance and parcelling of the tenancy to others is made; for thereby a benefit shall grow to the lord by multiplying his service; for he was a stranger to that act of his tenant, *res inter alios acta nemini nocere debent, sed prodesse possunt.*

§ 223. (1) But if a man hold his land of another by homage, fealty, and escuage, and certain rent, if the lord purchase part of the land, &c. in this case the rent shall be apportioned, as is aforesaid: but yet in this case the homage and fealty abide entire to the lord; for the lord shall have the homage and fealty of his tenant for the rest of the lands and tenements holden of him, as he had before, because that such services are not yearly services, and cannot be apportioned, but the escuage may and shall be apportioned according to the quantity and rate of the land, &c.

This case, without good observation, may seem *primâ facie* contrary to that which last is affirmed concerning entire things; but indeed it is a different case from that before, but not contrary; for the reasons of them are divers; it is true, that homage and fealty, and a tenure by knight's service, which always must be done by the person of a man, are entire services and individual; and yet Littleton saith, though the lord do purchase parcel of the tenancy, the homage and fealty, and knight's service, are not thereby extinct, but shall remain for the residue, although this purchase also was the voluntary act of the lord himself; and the different reason thereof is, for that in this case continuance of the entire service are *pro bono publico, et pro defensione regni*, whereas in that other case, those

(1) Coparceners hold by the service of being constable of England; he that marrieth the second is made king; the

entire service shall be done by the residue: Humphry de Bohun's case, 11 El. 235 b. [in Dyer].—Note in MS.



entire services did only concern the peculiar profit of the lord himself.\* Also, when a tenant doth once make homage and fealty to his lord, he doth it for all the lands and tenements which he doth hold of him, so that such entire services do extend to all his tenancy, and to every parcel thereof, *ergo*, &c.: and therefore although Littleton here saith, that the homage and fealty, by purchase of parcel, shall not be extinct, but shall remain for the residue, because that those services be not annual, and may not be apportioned, because that those services are entire, this is *ratio una, sed non unica*, as appeareth in 8 Co. 105 b. (1) And so *nota* reader, that the exterior semblance of discordance in this and other cases doth rise upon ignorance of the interior intelligence of them, and of the true reason and root of them; [for] for the most part every particular case is adjudged upon a particular reason, as it is said in 8 Co. 91 a.

§ 224. Also, if a man hath a rent-charge, and his father purchase parcel of the tenements charged in fee, and dieth, and this parcel descends to his son, who hath the rent-charge, now this charge shall be apportioned according to the value of the land, as is aforesaid of rent-service; because such portion of the land purchased by the father cometh not to the son by his own act, but by descent and by course of law.

Also, a rent-charge may be apportioned in certain cases; as if any part of the lands out of the which the rent is issuing doth descend unto him; for this is not his own act, but the law's (2). And by the same reason, if a man seised of land in fee take a wife, and enfeof another, the feoffee granteth a rent-charge unto the husband, and to the wife and to the heirs of the husband, the husband dieth, the wife is endowed of the part of the land, out of which the rent is issuing, and the [third] part of the rent in such case which the wife hath for life is extinct; and the two parts of the rent doth remain unto her, issuing out of the other two parts; for although this be a rent-charge, yet by act in law it shall be apportioned (3). *Vide* 9 Co. 135 b. *et seq.*

(1) See Co. Lit. 149 a, b.—Ed.

(2) A man holds of his eldest daughter by homage, and dieth seised, the younger

shall hold of the elder by homage. 11 El. 285, p. 39. Dyer.—*Note in MS.*

(3) See 3 Co. Lit. 150 a.—Ed.

§ 225. Also, if there be lord and tenant, and the tenant holds of his lord by fealty and certain rent, and the lord grants the rent by his deed to another, &c. reserving the fealty to himself, and the tenant attorns to the grantee of the rent, now this rent is rent-seck to the grantee; because the tenements are not holden of the grantee (1) of the rent, but are holden of the lord who reserved to him the fealty.

In this place is intreated of rent-seck; lord and tenant by fealty and certain rent, and the lord doth grant his rent by his deed unto another, reserving the fealty to himself, the tenant does attorn; now this is a rent-seck to the grantee. *Nota*, by the express saving or reserving to the lord the fealty, the tenements are not holden of the grantee of the rent, but, &c.; and other books do agree that the reservation of the fealty in this case [is requisite,] for otherwise by the only grant of the rent, the fealty also had passed. 39 *H.* 6. 24. and *Perkins*, 23*b.* *Brooke*, *Incidents*, 10. But by the grant of fealty the rent had not passed, although it had not been specially reserved; *ex hoc patet*, that the rent is the principal and the fealty incident, and accessory, contrary to the opinion of *Fitz.* in 27 *H.* 8. 21*a.* *vide librum*. If rent be recovered by default, the fealty is recovered also. 44 *E.* 3. 19.

§ 226. In the same manner, where a man holds his land by homage, fealty, and certain rent, if the lord grant the rent, saving to him the homage, such rent, after such grant, is rent-seck. But there where lands are holden by homage, fealty, and certain rent, if the lord will grant by his deed the homage of his tenant to another, saying to him the remnant of his services, and the tenant attorn to him according to the form of the grant; in this case the tenant shall hold his land of the grantee, and the lord who granted the homage

(1) In the *L.* and *M.* and *Roh.* editions of Littleton the reading is *grantee*; in the other editions, *grantor*: the same circumstance is noticed in *Hargrave & Butler's* Co. Lit., though the error is retained: I

have considered myself at liberty to make use of that reading which is most consistent with the commentator, and which is unquestionably the correct one.—*Ed.*

shall have but the rent as a rent-seck, and shall never distrain for the rent, because that homage nor fealty, nor escuage, cannot be said seck, for no such service may be said seck. For he, which hath or ought to have homage, fealty, or escuage, of his land, may, by common right, distrain for it, if it be behind; for homage, fealty, and escuage, are services, by which lands or tenements are holden, &c. and are such services as in no manner can be taken but as services, &c.

As in the precedent case the rent which was a rent-service is become a rent-seck in the grantee of the rent, where the grantor did reserve to him the fealty; because the tenure doth follow the fealty, as incident to the reversion; so in the same manner, if a man do hold the land by homage, fealty, and certain rent, if the lord do grant the rent saving the homage, the grantee hath but a rent-seck; for the fealty is incident to the reversion, and to the homage, and doth not in that case pass by the grant of the rent, although the grantor did not reserve fealty by express words; 26 *Ass. pl.* 38, by *Wilby*: and see *Brooke's Grant*, 73; no more than if one do hold by knight's service, and the lord do grant the homage, reserving the other service, the grant of the homage is void. 12 *E. 4.* 3 a.

But if there were lands holden by homage, fealty, and certain rent, if the lord will grant by his deed the homage of his tenant unto another, and saving unto him the remnant of the services, and the tenant attorn unto him according to the form of the grant; in this case the tenant shall hold his land of the grantee, and the lord who granted the homage shall have the rent, but as a rent-seck; for fealty, though not named, doth follow the grant of the homage. *Brooke, tit. Incidents*, 10, it is thus read, that where a rent is incident to a reversion as upon a lease for life, or gift in tail, if the rent be granted over, this is now a rent-seck, which was a rent-service before; and where there is lord and tenant by fealty, and rent, by the grant of the rent the fealty doth pass; for it is incident unto the rent: and [where the seignory is by homage, fealty, and rent, and the lord] does grant the rent, this is a rent-seck; for the fealty doth remain with the homage, as incident unto it: and the same law [is] where a rent is incident unto a reversion, *ut supra*.

But if lord and tenant by homage, fealty, and certain rent [be,] and the lord do release to the tenant all the right, which he hath in the

tenancy, saving to him the rent issuing out of the lands, yet his seignory doth remain, and the land is holden of him only by the rent, and fealty, which is incident to the rent (1). 9 E. 3. 1. *Releases*, 37. And in 12 E. 4. 11 a, the opinion of all the justices was, that this rent shall be in the same manner that it was before the release, (*scilicet*) rent-service, &c. and he shall have fealty.

In the conclusion of this case he proveth the case propounded to be but a rent-seck in the lord, because if it were his ancient rent-service, then he might distrain for it if it were behind; but in that case he cannot distrain, and the distress is given to the grantee of the homage and fealty.

§ 227. But otherwise it is of a rent, which was once rent-service; because when it is severed by the grant of the lord from the other services, it cannot be said rent-service, for that it hath not fealty unto it, which is incident to every manner of rent-service; and therefore it is called rent-seck. And the lord cannot grant such a rent with a distress, as it is said.

But otherwise it is when the rent which once was a rent-service, and is severed by the lord's grant from the other service; for now it cannot be said a rent-service; because it hath not to it which is incident to any manner of rent-service, and therefore it is called a rent-seck; for such a rent cannot be granted with distress; as is said, in this case, and in *Keilway*, 104, *pl.* 13. *Nota*, if a man take a wife seised of a reversion with certain rent, and have issue, and the wife dieth, he shall be tenant by the curtesy of the rent, and the heir shall have the reversion, and so the rent shall be severed from the reversion by the law, and yet the husband in this case cannot distrain for the said rent, and yet it was a rent-service in his wife; but because he cometh to have the said rent by his act, he shall not distrain; for it was his act to take her to his wife. And nevertheless you may see in that book (*pl.* 11.) that in three special cases a man may distrain for a rent-seck; and in *Littleton* (sect. 253.) a rent-

(1) See Co. Lit. 151 a.—*Ed.*

charge of common right for equality of partition, for which distress is incident; and *vide sect. 232.* distress for rent-seck. *Vide sect. 218.*

§ 228. Also, if a man let to another lands for term of life, reserving to him certain rent, if he grant the rent to another by his deed, saving to him the reversion of the land so letten, &c. such rent is but a rent-seck; because that the grantee had nothing in the reversion of the land, &c. But if he grant the reversion of the land to another for term of life, and the tenant attorn, &c. then hath the grantee the rent as a rent-service; for that he hath the reversion for term of life.

If a man doth let lands for term of life, &c. reserving a certain rent, which rent he doth grant by his deed to another, this shall be to him but a rent-seck: if the reversion be expressly saved to the grantor; for the word "rent" doth not carry with it the reversion; and therefore because he hath nothing in the reversion he hath but a rent-seck. But if he do grant the reversion of the land to another for term of life, and the tenant do attorn, then hath the grantee the rent as a rent-service, though no mention was in the grant of the rent in this case. *See sect. 572. accordat.*

§ 229. And so it is to be intended, that if a man give lands or tenements in tail, yielding to him and to his heirs a certain rent, or letteth land for term of life rendering a certain rent, if he grant the reversion to another, &c. and the tenant attorn, all the rent and service pass by this word (reversion) because that such rent and service in such case are incident to the reversion, and pass by the grant of the reversion. But albeit that he granteth the rent to another, the reversion doth not pass by such grant, &c.

This section, as the other, doth shew the force of the word "reversion" to be able to carry the rent and service with it; but by the grant of the rent the reversion doth not pass. And here mention

is made of the attornment of tenant in tail to make good the grant of him in the reversion; and in 12 E. 4. fo. 3. many arguments are made, that tenant in tail is not compellable to attorn, as the other tenants are; for they say, that attornment was ordained to make privity, so that the grantee may punish waste, &c.; and therefore tenant for life is compellable to attorn, but tenant in tail, or after possibility of issue extinct, is not punishable for waste, and therefore he is not within the original cause of attornment; also [tenant] in tail hath an inheritance, which by common intent may continue as perpetual as the estate of the donor; they further say, that his voluntary attornment is void; for tenant in tail thereby should prejudice his issues, and discharge them of their warranty against the donor, and of acquittal. But nevertheless the justices in the end did agree with Littleton's opinion in this case, that voluntary attornment is good; and they said, there are divers cases where the tenant shall not be compelled to attorn, except the grantee [will grant] unto him certain advantages, as acquittal, warranty, or to be dispunished for waste, and yet in such cases if he do attorn *gratis* it is good.

§ 230. So note the diversity. And so it is holden Pasc. 21 E. 4. But it is adjudged 26 of the *Book of Assises*, where the services of tenant in tail were granted, that this was a good grant, notwithstanding that the reversion remain.

The cause mentioned in 26 *Ass.* you may read in the book *placito* 38, which case Brooke, abridging *titulo Grants*, 73, saith, this is contrary to Littleton, in this place. *Quære.*

§ 231. Also, if there be lord, mesne, and tenant, and the tenant holdeth of the mesne by the service of 5s., and the mesne holdeth over by the service of 12d. if the lord paramount purchase the tenancy in fee, then the service of the mesnalty is extinct; because that when the lord paramount hath the tenancy, he holdeth of his lord next paramount to him, and if he should hold this of him which was mesne, then he should hold the same tenancy immediately of

divers lords by divers services, which should be inconvenient, and the law will sooner suffer a mischief than an inconvenience, and therefore the seignior of the mesnalty is extinct.

Here is said, that the law will rather suffer a mischief than an inconvenience, and to that purpose is the case in 9 H. 6. 31. *vide* 10 Co. 93a. *Vide Dyer*, 51a. *Vide* 7 Co. 26b. The example is here put, if the lord, mesne, and tenant be, the tenant holdeth of the mesne by the rent-service of 5s., and mesne by the rent of 12d.; if the lord paramount purchase the tenancy in fee, then the service of the mesnalty is extinct; for the lord must hold necessarily of the lord who is next paramount to him, and therefore he cannot hold the same lands or tenancy of the mesne, (as before is holden); for then he should hold the same tenancy immediately of divers lords by divers and by several services; and yet it is said in 6 Co. 51 b, *res inter alios acta alteri nocere non debet*.

§ 232. But in as much as the tenant holds of the mesne by 5s. and the mesne hold but by 12d. so as he hath more in advantage by 4s. than he pays to his lord, he shall have the said 4s. as a rent-seck yearly of the lord which purchased the tenancy.

Therefore because the mesnalty, which before was a rent-service, is extinct by the act of the lord paramount, and of the tenant per-avail, and is become but a rent-seck for the surplusage, the nature of the rent of the mesne is not altered by his own act, but by the act of others; therefore the ancient seisin is sufficient, and without any other seisin he may distrain (1). 4 Co. 9 b, *res inter alios acta alteri nocere non debet*.

§ 233. Also, if a man which hath a rent-seck, be once seised of any parcel of the rent, and after the tenant will not pay the rent

(1) See Co. Lit. 153 a; where it is said, "and yet (that is, notwithstanding that it is a rent-seck) he shall distrain

for it," and see note thereon by Mr. Hargrave.—*Ed.*

behind, this is his remedy. He ought to go by himself or by others to the lands or tenements out of which the rent is issuing, and there demand the arrearages of the rent; and if the tenant deny to pay it, this denial is a disseisin of the rent. Also, if the tenant be not then ready to pay it, this is a denial, which is a disseisin of the rent. Also, if the tenant, nor any other man, be remaining upon the lands or tenements to pay the rent when he demandeth the arrearages, this is a denial in law, and a disseisin in deed, and of such disseisins he may have an assize of *novel disseisin* against the tenant, and shall recover the seisin, of the rent, and his arrearages and his damages, and the costs of his writ and of his plea, &c. And if after such recovery and execution had, the rent be again denied unto him, then he shall have a *redisseisin*, and shall recover his double damages, &c.

But regularly distress doth not lie for a rent-seck, nor any other means to have it without seisin thereof had; and therefore in 6 Co. 58, *Brediman's case*, a rent devised out of land by his last will is called *redditus siccus et cæcus*, because it is remediless in his creation, either for the rent, or for the annuity, whereof see before sect. 218. But after lawful seisin thereof once had, then his remedy is by assize; and first the law requireth that he do solemnly demand the arrears of the rent at the place out of which the rent-seck is issuing, as more at large in the text of this section appeareth; and nevertheless I will add hereto that which is in 7 Co. 29, *Maud's case*, where it was resolved, that if a man, who hath a rent-seck payable yearly at the feast of Pasche, hath once seisin of the rent, and the feast of Pasche is past, and no tender or demand made of the rent, he may [demand it], although it be after the rent (1); and though the tenant of the land be not there, yet upon such demand, if none be ready to pay the rent, this is a denial in law, upon which he that hath the rent may have an assise, because no penalty upon it doth ensue, but only to have remedy to recover his rent, and the arrearage, with damages and costs. But in the same case, if the tenant be, at the last instant of the feast of Pasche, ready

(1) See Co. Lit. 153 b.—Ed.



upon the land to pay his rent, and he that hath the rent, nor any for him, doth come to demand, or receive it, in that case he that hath the rent cannot come in the absence of the tenant of the land, and demand it, and so to make him a disseisor, and render damages and costs, without any default in him; but in that case he that hath the rent, because default was in himself, must make demand of it upon the land unto the person of the tenant, and if he cannot find him upon any part of the land, out of which the rent is issuing, then in such case it behoveth him to demand the rent at the next feast of Pasche, with all the arrearage: and although this be in the absence of the tenant, yet it shall amount unto a denial in law, and upon it he, that hath the rent, shall recover all the rent, and arrearages, damages, and costs, and with this doth agree Littleton in this section. *Vide 8 Co. 146 a.*

§ 234. And *memorandum*, that this name assise is *nomen equivocum*; for sometimes it is taken for a jury, for the beginning of the record of an assise of *novel disseisin* beginneth thus: *assisa venit recognitura*, &c. which is the same as *jurata venit recognitura*. And the reason is, for that by the writ of assise it is commanded to the sheriff, *quòd faceret duodecim liberos et legales homines de vicineto*, &c. *videre tenementum illud, et nomina illorum imbreviare, et quòd summoveat eos per bonos summonitores, quòd sint coram justiciariis*, &c. *parati inde facere recognitionem*, &c. And because that, by such an original, a pannel by force of the same writ ought to be returned, &c. it is said in the beginning of the record in the assise, *assisa venit recognitura*, &c. Also, in a writ of right, it is commonly said that the tenant may put himself on God and the great assise. Also there is a writ in the register, which is called a writ *de magna assisa eligenda*. So as this is well proved, that this name assise sometimes is taken for a jury, and sometimes it is taken for the whole writ of assise; and according to this purpose it is most properly and most commonly taken, as an assise of *novel disseisin* is taken for the whole writ of assise of *novel disseisin*. And in the same manner an assise of common of pasture is taken for the whole writ of assise of common of pasture, and assise

of *mort d'auncester* is taken for the whole writ of assise of *mort d'auncester*, and assise of *darreine presentment* is taken for the whole writ of *darreine presentment*. But it seems, that the reason why such writs at the beginning were called assises was, for that by every such writ it is commanded to the sheriff, *quod summeat* 12, which is as much to say, that he ought to summon a jury. And sometimes assise is taken for an ordinance, to wit, to put certain things into a certain rule and disposition, as an ordinance, which is called *assisa panis et cervisie*.

In this place is shewed the divers signification of the word "assise," which is *nomen equivocum*; and I think it worth the labour also to remember that Coke, Chief Justice, saith, in his 8th book, fo. 40, touching the writ of assise at the common law, Assise was *remedium maxime festinum, et maxime beneficiale festinum*; for in no action at the common law a man can recover his land and damages, but only in assise against the disseisor; *vide the statute of Gloucester, cap. 1*. The neglect and discontinuance of assises, and real actions, hath of late time produced two inconveniences to the commonwealth, and a third [is], (if it be not stept in already) like to ensue; which see in *Co. Pref. to his 8th book*.

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§ 235. Also, if there be lord and tenant, and the lord granteth the rent of his tenant by deed to another, saving to him the other services, and the tenant attorneth, that is a rent-seck, as it is afore-said. But if the rent be denied him at the next day of payment, he hath no remedy, because that he had not thereof any possession. But if the tenant, when he attorneth to the grantee, or afterwards, will give a penny or a half-penny to the grantee in name of seisin of rent, then if after at the next day of payment the rent be denied him, he shall have an assise of *novel disseisin*. And so it is if a man grant by his deed a yearly rent issuing out of his land to another, &c. if the grantor then or after pay to the grantee a penny, or an half-penny, in the name of seisin of the rent, then, if after the next day of payment the rent be denied, the grantee may have an assise, or else not, &c.

Because the grantee of a rent-seck hath not remedy, unless he have seisin thereof, in this section is shewed who may give the seisin, and by what thing; therefore if there be lord and tenant, and the lord doth grant the rent of his tenant by his deed, (as it must be) unto another, saving unto him the service, without which words it seemeth his opinion was, they had passed with the rent, and then the grantee should have it as a rent-service, and the tenant do attorn, (for it is a necessary circumstance) then he is the person that may give to him seisin, and that must be by some thing that is of the nature of the thing granted; for upon the grant of a rent, the tenant may attorn, or put the grantee in possession by a bullock, or such like, because it is another thing; but upon the recovery of a rent the sheriff may. 49 E. 3. 15. *Finch, li. 1. fo. 9 b.* So it is if a man grant by his deed a yearly rent issuing out of his land to another, in this case the grantor is the person who must give him seisin in form aforesaid; and of this matter touching seisin read diligently *Brediman's case, in 6 Co. 57*, where amongst many notable things it is said, as *possessio* is derived *a pos et sedeo*, because he that is in possession may sit down in good repose and quiet, so *seisina* also is derived *a sedendo*; for till he have seisin all is *labor et dolor et vexatio spiritus*, but when he hath seisin he may *sedere et accumbere in pace et tranquillitate*, &c. *Lege seq. Ibidem.* And seisin is more than attornment, for every lawful seisin doth include attornment, [ but attornment ] doth not include seisin.

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§ 236. Also, of rent-seck a man may have an assize of *mort d'ancester*, or a writ of *ayel* or *cosinage*, and all other manner of actions real, as the case lieth, as he may have of any other rent.

*Item*, after seisin, he that hath an estate of frank-tenement, or inheritance in a rent-seck, may have an action real, as his case shall require; as he may have for a rent-service, or a rent-charge; and how he shall make his demand of the rent, and when to have remedy, in part may appear in this section; and more at large in 7 Co. 29.

§ 237. Also, there be three causes of disseisin of rent-service, that is to say, rescous, replevin, and inclosure. Rescous is, when

the lord distraineth in the land holden of him for his rent behind, if the distress be rescued from him, or if the lord come upon the land, and will distrain, and the tenant or another man will not suffer him, &c. Replevin is, when the lord hath distrained, and replevin is made of the distress by writ or by plaint. Inclosure is, if the lands and tenements be so inclosed, that the lord may not come within the lands and tenements for to distrain. And the cause, why such things so done be disseisins made to the lord, is for this, that by such things the lord is disturbed of the means by which he ought to have come to his rent, *scil.* of the distress.

There be three cases of disseisin of rent-service, viz. rescous, replevin, and inclosure: rescous is in two sorts; 1st. when the lord doth distrain in the land holden of him for his rent behind, if the distress be rescued from him; [2d.] if the lord do come upon the [land], and would distrain, but the tenant or some other man will not suffer him; now for such a rescous before the distress taken, he may have assise, but not a writ of rescous; for this doth lie only when he once had the possession of his distress, and after it is rescued from him. 21 H. 7. fo. 40. Replevin is, when the lord hath distrained, and a replevin is made of the distress by writ or by plaint. Inclosure is, if the lands or the tenements be so inclosed, that the lord cannot come within them to distrain; and the cause is, for that by such things the lord is disturbed of the means by which he ought to have, and to come to his rent, that is to say, to the distress.

§ 238. And there be four causes of disseisin of a rent-charge, *scil.* rescous, replevin, inclosure, and denial; for denial is a disseisin of a rent-charge, as is said before of a rent-seck.

There be four causes of disseisin of a rent-charge, rescous, replevin, inclosure, and denier, for denier is a disseisin of a rent-charge, as of a rent-seck; and you may perceive before, sect. 233, that denier is twofold, denier in *fait*, and denier in law.

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§ 239. And there be two causes of disseisin of a rent-seck, that is to say, denial and inclosure.

Of a rent-seck there are two causes of disseisin, that is to say, denier, and inclosure; and yet he cannot distrain, but in special cases, as before may appear; but the cause wherefore inclosure is a cause of disseisin of a rent-seck is, because he must make demand in the land for the rent, as you read before (1).

§ 240. And it seemeth, that there is another cause of disseisin of all the three services aforesaid; that is, if the lord is going to the land holden of him for to distrain for the rent behind, and the tenant hearing this encountereth with him, and forestalleth him the way with force and arms, or menaceth him in such form that he dare not come to the land to distrain for his rent behind for doubt of death, or bodily hurt, this is a disseisin, for that the lord is disturbed of the means whereby he ought to come to his rent. And so it is, if, by such forestalling or menacing, he that hath rent-charge or rent-seck is forestalled, or dare not come to the land to ask the rent behind, &c.

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Also, forestalling is another cause of disseisin of all the said three rents. *Vide Finch's 2d book, cap. 10.*

(1) See Co. Lit. 161 b.—Ed.

LIB. III. CAP. I.—*PARCENERS*.

## SECTION 241.

**P**ARCENERS are of two sorts: to wit, parceners according to the course of the common law, and parceners according to the custom. Parceners after the course of the common law are, where a man, or woman, seised of certain lands or tenements in fee simple or in tail, hath no issue but daughters, and dieth, and the tenements descend to the issues, and the daughters enter into the lands or tenements so descended to them, then they are called parceners, and be but one heir to their ancestor. And they are called parceners; because by the writ, which is called *breve de participatione faciendâ*, the law will constrain them, that partition shall be made among them. And if there be two daughters to whom the land descendeth, then they be called two parceners; and if there be three daughters, they be called three parceners; and four daughters, four parceners; and so forth.

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In this chapter (1) is treated of parceners at the common law; and the Statute Hiberniæ, made 14 H. 3. doth recite, that by the common law lands and tenements shall descend to all the heirs females, who are in one degree to their ancestor, and they shall be as one heir, differing from the descent to the heirs males; and the reason thereof is, the respect the law beareth to the feminine sex, and to enable them to a speedy advancement in marriage; and they are called parceners, he saith, because that a writ of partition would lie at the common law; the writ did not lie against tenants in common or joint-tenants. And it is observable that the author doth instruct the student diligently to learn the words and terms of the law; for thereby the matters themselves shall be the easier and better understood; and as the notion of the word "parceners" is taken from the

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(1) In this Chapter on Parceners, there are occasional alterations in the handwriting of Mr. Hargrave in his copy of the Commentary. He has however merely

restored the right reading where it was lost, or supplied words which were illegible in the original MS.—Ed.

writ, so you see the word "assise" had his appellation from the first word of the record of assize of novel disseisin. *Sect. 234.* But the possession of the king sometimes shall change the course of things, and this shall not be for the nature of the estate, but for the quality of the person; for if the king purchaseth lands, and have issue two daughters, and dieth, not having issue a son, this land shall descend only to the eldest daughter (1). *Plowd. 246 b. et 247 a.* For *lex terræ* is one in respect of the common subject, and *lex coronæ* is another; for if the king have two daughters, or two sisters, and die without issue, the eldest sole is to be preferred. *Egerton's Post-nati, 33 and 36. Ubi lex distinguit et nos distinguere debemus.*

William the Conqueror gave the earldom to Hugh de Lupus, his nephew, who died, having issue daughters; it was resolved, that they should not have the earldom, *nec tanta hæreditas inter colos distribueretur. Vide Serjeant Doddridge del Earl de Chester.*

§ 242. Also, if a man seised of tenements in fee simple or in fee tail dieth without issue of his body begotten, and the tenements descend to his sisters, they are parceners, as is aforesaid. And in the same manner, where he hath no sisters, but the lands descend to his aunts, they are parceners, &c. But if a man hath but one daughter, she shall not be called parcener, but she is called daughter and heir, &c.

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As the lineal heirs females, so the collateral, as sisters, aunts, are parceners; but if there be but one daughter, or one sister, or one aunt, &c. she is not aptly to be called a parcener, but daughter, sister, aunt, &c. It is no less fault in a student to speak by words improper, and not observing the lawyer's dialect, than for a grammarian to speak false and incongruous Latin.

§ 243. And it is to be understood, that partition may be made in divers manners. One is, when they agree to make partition, and

(1) The crown shall not be divided amongst daughters (35 H. 6.) because the possession of the king (whose riches is *vinculum pacis et bellorum nervi*) shall not be divided, and consequently enfeebled; and that is the reason why there is no

dower nor tenancy by the curtesy of the crown. The king's jewels shall go to his successors, not to his executors, for they are a great part of the king's riches.—*Note in MS.*

do make partition of the tenements; as if there be two parceners to divide between them the tenements in two parts, each part by itself in severalty and of equal value; and if there be three parceners, to divide the tenements in three parts by itself in severalty, &c.

The law did invent the writ of partition amongst parceners to prevent all occasions of discord and variance, that otherwise might happen amongst those female co-heirs, so near united in blood; and nevertheless if the parties themselves did consent, that partition should be made otherwise, or in any other manner the law did allow and approve it.

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§ 244. Another partition there is, viz. to choose, by agreement between themselves, certain of their friends, to make partition of the lands or tenements in form aforesaid. And in these cases, after such partition, the eldest daughter shall choose first one of the parts so divided, which she will have for her part, and then the second daughter next after her another part, and then the third sister another part, then the fourth another part, &c. if so be that there be more sisters, &c. unless it be otherwise agreed between them. For it may be agreed between them, that one shall have such tenements and another such tenements, &c. without any primer election.

§ 245. And the part which the eldest sister hath, is called in Latin *enitia pars*. But if the parceners agree, that the eldest sister shall make partition of the tenements in manner aforesaid, and if she do this, then it is said, that the eldest sister shall choose last for her part, and after every one of her sisters, &c.

Also, if they agree that the division shall be made by indifferent friends, it is good, and in such case the eldest daughter is to make the first election, *et sic de cæteris*; which privilege she hath by her seniority: and as the law doth give the eldest priority of election, because she is most worthy of blood, so she is to have the precedence.

And the part which the eldest coparcener hath, where the partition is made by others, is called by Littleton in Latin *enitia pars*.



*Vide Bracton, li. 2. cap. 34. fo. 76 et 77.* But if the agreement betwixt them is, that the eldest coparcener shall make the partition, she shall choose last, for *cujus est divisio alterius est electio*.—*Lambert's Customs of Kent, fo. 623.*

§ 246. Another partition or allotment is, as if there be four parceners, and after partition of the lands be made, every part of the land by itself is written in a little scrowl, and is covered all in wax in manner of a little ball, so as none may see the scrowl, and then the four balls of wax are put in a hat to be kept in the hands of an indifferent man, and then the eldest daughter shall first put her hand into the hat, and take a ball of wax with the scrowl within the same ball for her part, and then the second sister shall put her hand into the hat and take another, the third sister the third ball, and the fourth sister the fourth ball, &c. and in this case every one of them ought to stand to their chance and allotment.

Of this manner of allotment mention is made in *Bracton, li. 2. cap. 34*, and in these precedent cases *consensus tollit errorem*, if peradventure the division be not made according to yearly equal value.

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§ 247. Also, there is another partition. As if there be four parceners, and they will not agree to a partition to be made between them, then the one may have a writ of *partitio facienda* against the other three, or two of them may have a writ of *partitio facienda* against the other two, or three of them may have writ of *partitio facienda* against the fourth, at their election.

One other kind of partition is by the writ of partition, which every one of them may have against the rest altogether, or against two or three of them; *et sic de cæteris*.

§ 248. And when judgment shall be given upon this writ, the judgment shall be thus; that partition shall be made between the

parties, and that the sheriff in his proper person shall go to the lands and tenements, &c. and that he by the oath of twelve lawful men of his bailiwick, &c. shall make partition between the parties, and that one part of the lands and tenements shall be assigned to the plaintiff or to one of the plaintiffs, and another part to another parcener, &c. not making mention in the judgment of the eldest sister more than of the youngest.

And in such case when the partition is made by writ, how the sheriff shall proceed to the partition after judgment given, (the partition shall be made by the oath of twelve men,) doth here appear; which proceeding by the sheriff is final and peremptory. *Vide Dyer, 77 a, et ibid. 52 a. Et expedit reipublicæ ut sit finis litium, ne lis ex lite oriatur*: and in this case the eldest coparcener cannot claim any election, for the [law] in her judgments and executions doth regard the substance more than circumstance; *et nota 11 Co. 40 a, b*, that in this writ of partition there are two judgments; one, *quod partitio fiat*; the other, *quod partitio stabilis in perpetuum teneatur*; the first judgment is but as an award of the court, and is but interlocutory, and not definitive, whereof no writ of error doth lie, till the last judgment given (1); *a sententiâ interlocutoriâ non appellatur jure civili*.

§ 249. And of the partition which the sheriff hath so made, he shall give notice to the justices under his seal, and the seals of every of the twelve, &c. And so in this case you may see, that the eldest sister shall not have the first election, but the sheriff shall assign to her, her part which she shall have, &c. And it may be that the sheriff will assign first one part to the youngest, &c. and last to the eldest, &c.

And after the partition so made by the sheriff, he must thereof give notice unto the justices under his seal, and under the seals of every of the twelve; and see more of this partition by writ, *sect. 276. Nota*, the sealing of writings came originally into this kingdom by

(1) So Co. Lit. 168 a.—Ed.

the Conqueror. *The Preface to Co. 3. fo. 5. Lambert's Perambulation of Kent*, 404. *Howard's Chronicle*, 98. *Selden's Titles of Honor*, 327; and *Poliolbion*, 69.

§ 250. And note, that partition by agreement between parceners may be made by law between them, as well by parol without deed, as by deed.

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And partition by agreement between parceners may be made by the law between them as well by word only, as by deed in writing: *vide* 3 E. 4. 9 a, and 11 H. 4. 3; partition made by word for lands in several counties is good, *per cutiam*; and rent upon such partition may be reserved. But joint-tenants or tenants [in] common may not make partition by word, as coparceners may by the common law (1). 6 Co. 12 b. Neither may exchanges be made of lands in several counties, as doth appear in Littleton, *sect.* 63.

§ 251. Also, if two meases descend to two parceners, and the one mease is worth twenty shillings per annum, and the other but ten shillings per annum: in this case partition may be made between them in this manner: to wit, the one parcener to have the one mease, and the other parcener the other mease; and she which hath the mease worth twenty shillings per annum, and her heirs, shall pay a yearly rent of five shillings issuing out of the same mease to the other parcener and to her heirs for ever, because each of them should have equality in value.

§ 252. And such partition made by parol is good enough; and that parcener, who shall have the rent, and his heirs, may distrain of common right for the rent in the said mease worth twenty shillings, if the rent of five shillings be behind at any time, in whose hands soever the same mease shall come, although there never were any writing of this made between them for such a rent.

And a rent for equality of partition between parceners shall be fee simple without word "heirs:" *Plowd.* 131 b: and shall issue

out of the land without expressing it. 29 *Ass. pl.* 23. Also partition of a rent, reversion, seignory, way, advowson, or such like, shall be good without deeds, otherwise it is of grants. *Finch, li.* 1. *fo.* 9 *b*, *et seq.* Note, that in this case respect must be had to the cause, wherefore the rent was granted; and therefore 15 *H.* 7. *fo.* 14 *a*, one coparcener did grant a rent to two other coparceners for equality of partition, though the words be joint, yet the cause of the grant must be respected, and the rent must be of the equality of the land, and therefore they shall have the rent in degree and nature of coparceners, and not jointly (1). 38 *E.* 3. 26 *b*. If two coparceners be, and they join in a feoffment in fee, reserving a rent to them, and to their heirs, the several heirs of the one, and of the other, shall inherit, because the right in the lands was several. 5 *Co.* 8 *a*. Equality is the law of equity. 2 *H.* 7. 5.

§ 253. In the same manner it is of all manner of lands and tenements, &c. where such rent is reserved to one or to divers parceners upon such partition, &c. But such rent is not rent-service, but a rent-charge of common right had and reserved for equality of partition.

And such a rent is not a rent-service, but a rent-charge of common right had and reserved for equality of partition. 3 *Co.* 22 *b*. And it is a rent-charge without words of distress.

§ 254. And note, that none are called parceners by the common law, but females or the heirs of females, which come to lands or tenements by descent: for if sisters purchase lands or tenements, of this they are called joint-tenants, and not parceners.

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And see *sect.* 662, a special case, where sisters did take inheritance by descent, and yet they are not parceners, but tenants in common; and for the understanding of those words (heirs of females,) *vide Lambert's Customs of Kent, fo.* 547 *a*.

§ 255. Also, if two parceners of lands in fee simple make partition between themselves, and the part of the one valueth more than the part of the other, if they were at the time of the partition of full age, (*scil.*) of twenty-one years, then the partition shall always remain, and be never defeated. But if the tenements (whereof they make partition) be to them in fee tail, and the part of the one is better in yearly value than the part of the other, albeit they be concluded during their lives to defeat the partition; yet if the parcener, which hath the lesser part in value, hath issue and die, the issue may disagree to the partition, and enter and occupy in common the other part which was allotted to her aunt, and so the other may enter and occupy in common the other part allotted to her sister, &c. as if no partition had been made.

If two parceners of full age, seised of lands in fee simple, do make partition, though it be unequal, as if one land be encumbered with actions, and the other not, or if one part do lie easy and commodious, and the other not, then it is not equal; 19 H. 6. 26, *per Newton*; yet it cannot be defeated; but he that hath the part less in value must stand to his own harm; for it was his own [negligence]; *negligentia semper habet comitem infortunium*. But if the lands whereof they were parceners were entailed unto them, and the part of the one is better in yearly value than the part of the other is, the parties themselves are thereby concluded, and bound during their lives; yet if the parcener that had the lesser part have issue and die, the issue may disagree to the partition, and enter, and occupy in common, the other part that was allotted to his aunt, as if no partition had been made; for tenant in tail may not prejudice the issue *neque per factum neque per feoffamentum*, by the statute Westm. 2. cap. 1.

§ 256. Also, if two parceners of lands in fee take husbands, and they and their husbands make partition between them, if the part of the one be less in value than the part of the other, during the lives of their husbands the partition shall stand in its force. But albeit it shall stand during the lives of their husbands, yet after the death of the husband, that woman which hath the lesser part may enter into her sister's part, as is aforesaid, and shall defeat the partition.

Partition made by the parceners' husbands, if it be unequal, doth not bind them after the death of their husbands; but if she that had the lesser part after the death of her husband doth agree to it, she is bound thereby, as in case of exchange made by the husband and wife; or if a lease be made by the husband and wife of the lands of the wife for life, or for years, reserving a rent, in this case if the husband die, and the wife accept the rent, the lease is confirmed. *Keilw.* 10 *a.* And 8 *E.* 4. 4 *b.* it was holden by all the justices, that partition, made by the husband of the lands in the right of his wife, was good, and the wife may not disagree without reasonable cause, as if the partition be not equal, or because her part is encumbered without action. *F. N. B.* 62 *F.*

§ 257. But if the partition made between the husbands were thus, that each part at the time of the allotment made, was of equal yearly value, then it cannot afterwards be defeated in such cases.

And it is sufficient, if that such partition made by the husband were equal in value at the time of the partition made, although afterwards it prove unequal, and one part to be of greater value than the other, by a mine found therein; yet the other cannot avoid that partition for that cause. And note in 9 *Co.* 85 *b.* this rule taken, that all things made or done out of the court by the husband, which thing he and his wife were compelled to do by the law, these things shall be established.

§ 258. Also, if two coparceners be, and the youngest being within the age of twenty-one years, partition is made between them, so as the part which is allotted to the youngest is of less value than the part of the other, in this case the youngest, during the time of her non-age, and also when she cometh to full age, (*scil.*) of twenty-one years, may enter into the part allotted to her sister, and shall defeat the partition. But let such parcener take heed when she comes to her full age, that she taketh not to her own use all the profits of the lands or tenements which were allotted unto her; for then she agrees to the partition at such age, in which case the

partition shall stand and remain in its force. But peradventure she may take the profits of the moiety, leaving the profits of the other moiety to her sister.

If partition be made by two coparceners, one of them being within age, the non-age of one is no impediment to the partition. 9 H. 6. 5. And 21 H. 6. 25 b, she that hath the lesser part may enter and avoid this partition, either during her non-age, or after she cometh to her full age of twenty-one years; *quod nota*, 21 H. 7. 29 a.

But it is observable, that in some cases an infant is restrained to reverse that which he hath done to his prejudice during the time of his minority; for if he acknowledge a fine during his non-age, he cannot reverse it after he is of full age: 10 Co. 42 b, et 2 Co. 58 a: or if an infant do acknowledge a statute merchant, or a recognizance in the nature of a statute staple, it shall not be avoided, but during the non-age by a writ of *audita querela*. Register, 150 b, Dyer, 232 b, et Finch, 51, et 10 Co. 43 a; but in this case of partition it is not so.\*

§ 259. And it is to be understood, that when it is said, that males or females be of full age, this shall be intended of the age of twenty-one years; for if before such age any deed or feoffment, grant, release, confirmation, obligation, or other writing, be made by any of them, &c. or if any within such age be bailiff or receiver to any man, &c. all serve for nothing, and may be avoided. Also, a man before the said age shall not be sworn in an inquest, &c.

And Littleton doth give this caveat to such an infant, that when she cometh to her full age, she do not take to her own use all the profits of those lands and tenements, that so were allotted unto her; for then thereby she doth agree to such partition, and by such her act the partition shall abide and continue in force, and is an estoppel to her; but peradventure she may take the profits of the moiety, leaving the other profits of the other moiety to her sister. 43 Ass. 14. Two coparceners, one within age, do make partition, which is not equal, in that case it may be avoided during the non-age; but if she at her full age, or her husband, make a lease of any part thereof, which is a declaration of their agreement, she is perpetually bound; and note 3 Co. 26 a, where it is said, that the law doth respect acts, but words without deeds are not regarded in law.

§ 260. Also, if lands or tenements be given to a man in tail, who hath as much land in fee simple, and hath issue two daughters and die, and his two daughters make partition between them, so as the land in fee simple is allotted to the younger daughter in allowance for the lands and tenements in tail allotted to the elder daughter, if, after such partition made, the younger daughter alieneth her land in fee simple to another in fee, and hath issue a son or daughter and dies, the issue may enter into the lands in tail and hold and occupy them in purparty with her aunt. And this is for two causes. One is, for that the issue can have no remedy for the land sold by the mother, because the land was to her in fee simple; and in as much as she is one of the heirs in tail, and hath no recompence of that which belongeth to her of the lands in tail, it is reason that she hath her portion of the lands tailed, and namely when such partition doth not make any discontinuance.

But the contrary is holden M. 10 H. 6. (*scil.*) that the heir may not enter upon the parcener who hath the entailed land, but is put to a *formedon*.

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Although the age of male do differ in many cases, as before doth appear in the Chapter of Tenure by Knight's Service, yet in this is but one full age in both sexes, that is, twenty-one years, to make a good feoffment, or a release, or a confirmation, or an obligation, or other writing; and the same law [is] in other cases in this section.

§ 261. Another reason is, for that it shall be accounted the folly of the eldest sister, that she would suffer or agree to such a partition, where she might, if she would, have had the moiety of the land in fee simple, and a moiety of lands entailed, for her part, and so to be sure without loss.

A man seised of two acres of land of equal value, and of the one acre hath estate in fee simple, and of the other fee tail, and dieth, having issue two daughters, who do make partition between them, so that the land in fee simple is allotted to one in allowance of the acre in tail allotted to the other; if after she that hath the acre in



fee simple, alieneth it, and dieth, having issue; the issue may not enter into the entailed acre, and hold and occupy in perpetuity with his aunt; and this for two causes, as in the book are alleged. Read for this manner of partition, *M. 20 H. 6. 13 et 14.*

§ 262. Also, if a man be seised in fee of a carve of land by just title, and he disseise an infant within age of another carve, and hath issue two daughters, and dieth seised of both carves, the infant being then within age, and the daughters enter and make partition, so as the one carve is allotted for the part of the one, as *per case*, to the youngest in allowance of the other carve which is allotted to the purparty of the other, if afterwards the infant enter into the carve whereof he was disseised upon the possession of the parcener which hath the same carve, then the same parcener may enter into the other carve which her sister hath, and hold in parcenery with her. But if the youngest alien the same carve to another in fee before the entry of the infant, and after the infant enter upon the possession of the alienec, then she cannot enter into the other carve; because by her alienation she hath altogether dismissed herself to have any part of the tenements as parcener. But if the youngest before the entry of the infant make a lease of this for term of years, or for term of life, or in fee tail, saving the reversion to her, and after the infant enter, there peradventure otherwise it is; because she hath not dismissed herself of all which was in her, but hath reserved to her the reversion and the fee, &c.

If a man be seised of an acre of land by a just title, and doth disseise an infant within age, of another acre, and hath issue two daughters, and dieth seised of both acres, the infant then being within age, and the daughters enter, and make partition, so that one acre is allotted to the one in allowance of the other acre allotted to the other; if after the infant doth enter into the acre of which he was disseised, as he may by the law, (as appeareth, *sect. 402.*) upon the possession of the parcener that hath that acre, then that same parcener, &c. (1).

(1) No notice is taken in the MS. of the Chapter on Joint-tenants, nor is the following sections until the beginning any cause for the omission stated—*Ed.*

§ 263. Also, if there be three or four coparceners, &c. which make partition between them, if the part of the one parcener be defeated by such lawful entry, she may enter and occupy the other lands with all the other parceners, and compel them to make new partition between them of the other lands, &c.

§ 264. Also, if there be two parceners, and the one taketh husband, and the husband and wife have issue between them, and his wife dieth, and the husband keeps himself in as tenant by the curtesy, in this case the parcener which surviveth, and the tenant by the curtesy, may well make partition between them, &c. And if the tenant by the curtesy will not agrée to make partition, then the parcener which surviveth may have against the tenant by the curtesy a writ *de partitione faciendá*, &c. and compel him to make partition. But if the tenant by the curtesy would have partition to be made between them, and the parcener which surviveth will not have this, then the tenant by the curtesy cannot have any remedy to have partition, &c. For he cannot have a writ of *partitione faciendá*, because he is no parcener. For such a writ lieth for parceners only. And so you may see, that a writ of *partitione faciendá* lieth against tenant by the curtesy, and yet he himself cannot have the like writ.

### LIB. III. CAP. II.—PARCENERS BY CUSTOM.

§ 265. Parceners by custom are, where a man seised in fee simple, or in fee tail, of lands or tenements which are of the tenure called gavelkind, within the county of Kent, and hath issue divers sons and die, such lands or tenements shall descend to all the sons by the custom, and they shall equally inherit and make partition by the custom, as females shall do, and a writ of partition lieth in this case as between females. But it behoveth in the declaration to make mention of the custom. Also such custom is in other places of England, and also such custom is in North Wales, &c.

§ 266. Also, there is another partition which is of another nature and of another form than any of the partitions aforesaid be. As if a man seised of certain lands in fee simple hath issue two daughters,

and the eldest is married, and the father giveth part of his lands to the husband with his daughter in frank-marriage, and dieth seised of the remnant, the which remnant is of a greater yearly value than the lands given in frank-marriage.

§ 267. In this case, neither the husband nor wife shall have any thing for their purparty of the said remnant, unless they will put their lands given in frank-marriage in *hotchpot*, with the remnant of the land with her sister. And if they will not do so, then the youngest may hold and occupy the same remnant, and take the profits only to herself. And it seemeth, that this word (*hotchpot*) is in English a pudding; for in this pudding is not commonly put one thing alone, but one thing with other things together. And therefore it behoveth in this case to put the lands given in frank-marriage with the other lands in *hotchpot*, if the husband and wife will have any part in the other lands.

§ 268. And this term (*hotchpot*) is but a term similitudinary, and is as much to say, as to put the lands in frank-marriage, and the other lands in fee simple together: and this is for this intent, to know the value of all the lands, (*scil.*) of the lands given in frank-marriage, and of the remnant which were not given, and then partition shall be made in form following. As, put the case, that a man be seised of thirty acres of land in fee simple, every acre of the value of 12*d.* by the year, and that he hath issue two daughters, and the one is covert baron, and the father gives ten acres of the thirty acres to the husband with his daughter in frank-marriage, and dieth seised of the remnant, then the other sister shall enter into the remnant, viz. into the twenty acres, and shall occupy them to her own use, unless the husband and his wife will put the ten acres given in frank-marriage with the twenty acres in *hotchpot*, that is to say together; and then when the value of every acre is known, to wit, what every acre valueth by the year, and it is assessed or agreed between them, that every acre is worth by the year 12*d.*, then the partition shall be made in this manner, viz. the husband and wife shall have, besides the ten acres given them in frank-marriage, five acres in severalty of the twenty acres, and the other sister shall have the remnant, (*scil.*) fifteen acres of the twenty acres for her purparty,

so as accounting the ten acres which the baron and feme have by the gift in frank-marriage, and the other five acres of the twenty acres, the husband and wife have as much in yearly value as the other sister.

§ 269. And so always upon such partition the lands given in frank-marriage remain to the donees and to their heirs according to the form of the gift: for if the other parcener should have any of that which is given in frank-marriage, of this would ensue an inconvenience and a thing against reason, which the law will not suffer. And the reason, why the lands given in frank-marriage shall be put in *hotchpot*, is this, When a man giveth lands or tenements in frank-marriage with his daughter, or with his other cousin, it is intended by the law, that such gift made by this word (*frank-marriage*) is an advancement, and for advancement of his daughter, or of his cousin, and namely when the donor and his heirs shall have no rent nor service of them, but fealty, until the fourth degree be past. And for this cause the law is, that she shall have nothing of the other lands or tenements descended to the other parcener, &c. unless she will put the lands given in frank-marriage in *hotchpot*, as is said. And if she will not put the lands given in frank-marriage in *hotchpot*, then she shall have nothing of the remnant, because it shall be intended by the law, that she is sufficiently advanced, to which advancement she agreeth and holds herself content.

§ 270. The same law is between the heirs of the donees in frank-marriage, and the other parceners, &c. if the donees in frank-marriage die before their ancestor, or before such partition, &c. as to put in *hotchpot*, &c.

§ 271. And note, that gifts in frank-marriage were by the common law before the statute of Westm. 2d. and have been always since used and continued, &c.

§ 272. Also, such putting in *hotchpot*, &c. is where the other lands or tenements which were not given in frank-marriage, descend from the donors in frank-marriage only; for if the lands shall descend to the daughters by the father of the donor, or by the mother of the donor, or by the brother of the donor or other ancestor, and not by the donor, &c. there it is otherwise; for in such case she

to whom such gift in frank-marriage is made, shall have her part, as if no gift in frank-marriage had been made, because that she was not advanced by them, &c. but by another, &c.

§ 273. Also, if a man be seised of thirty acres of land, every acre of equal annual value, and have issue two daughters as aforesaid, and giveth fifteen acres hereof to the husband with his daughter in frank-marriage, and dies seised of the other fifteen acres, in this case the other sister shall have the fifteen acres so descended to her alone, and the husband and wife shall not in this case put the fifteen acres given to them in frank-marriage into *hotchpot*; because the tenements given in frank-marriage are of as great and good yearly value as the other lands descended, &c. For if the lands given in frank-marriage be of equal or of more yearly value than the remnant, in vain and to no purpose shall such tenements given in frank-marriage be put in *hotchpot*, &c. for that she cannot have any of the other lands descended, &c. for if she should have any parcel of the lands descended, then she shall have more in yearly value than her sister, &c. which the law will not, &c. And as it is spoken in the cases aforesaid, of two daughters or of two parceners, in the same manner it is in the like case, where there are more sisters or more parceners, according as the case and matter is, &c.

§ 274. And it is to be understood, that lands or tenements given in frank-marriage shall not be put in *hotchpot*, but where lands descend in fee simple; for of lands descended in fee tail partition shall be made, as if no such gift in frank-marriage had been made.

§ 275. Also, no lands shall be put in *hotchpot* with other lands, but lands given in frank-marriage only: for if a woman have any other lands or tenements by any other gift in tail, she shall never put such lands so given in *hotchpot*, but she shall have her purparty of the remnant descended, &c. (videlicet) as much as the other parcener shall have of the same remnant.

§ 276. Also, another partition may be made between parceners, which varieth from the partitions aforesaid. As if there be three parceners, and the youngest will have partition, and the other two will not, but will hold in parcenary that which to them belongeth,

without partition; in this case, if one part be allotted in severalty to the youngest sister, according to that which she ought to have, then the others may hold the remnant in parcenary, and occupy in common without partition, if they will, and such partition is good enough. And if, afterwards, the eldest or middle parcener will make partition between them of that which they hold, they may well do this when they please. But where partition shall be made by force of a writ of *partitio facienda*, there it is otherwise; for there it behoveth, that every parcener have her part in severalty, &c.

More shall be said of parceners, in the chapter of Joint-tenants, and also in the chapter of Tenants in Common.

### LIB. III. CAP. III.—JOINT-TENANTS.

§ 277. Joint-tenants are, as if a man be seised of certain lands or tenements, &c. and infeoffeth two, three, four, or more, to have and to hold to them for term of their lives, or for term of another's life, by force of which feoffment or lease they are seised, these are joint-tenants.

As in the last chapter you have seen a different course of lands and tenements amongst parceners, from the descent to the eldest heir male by the course of the common law; so in this chapter is treated of a special manner of conveyance to many by purchase, which one single person doth make to himself of any lands or tenements, and to his heirs, as in this chapter at large doth appear. *See Finch, fo. 32 a.*

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§ 278. Also, if two or three, &c. disseise another of any lands or tenements to their own use, then the disseisors are joint-tenants. But if they disseise another to the use of one of them, then they are not joint-tenants; but he to whose use the disseisin is made is sole tenant, and the others have nothing in the tenancy, but are called coadjutors to the disseisin, &c.

Here again the student is instructed to speak according to the phrase and speech known and used in the law; a disseisor is one, an intruder another, an abator a third, and each of them differ from the other. A disseisin made to the use of J. S. who is absent, his agreement after shall make him a disseisor, as if he had been present at the time of the disseisin committed. 37 Ass. pl. 8.—38 Ass. pl. 9. *Sir John Davies*, 44 b. By Saunders, Chief Justice; without an express agreement the frank-tenement is not vested in *cestui que use*; *sed alii aliter sentiunt*. *Dyer*, 141. But if divers persons do enter with force to the use of another, who himself doth not enter, but after doth agree to this entry to his use; this agreement doth make him a disseisor, or a trespasser; but he shall not thereby be punished for the force; for there cannot be any forcible entry where there is no actual entry. 2 H. 7. 16 b. 17 Ass. pl. 19. *Ferdinando Poulton*, 36 b. Sect. 21.

§ 279. And note, that disseisin is properly, where a man entereth into any lands or tenements where his entry is not congeable, and ousteth him which hath the freehold, &c.

A disseisin is properly, where a man doth enter into any lands and tenements, where his entry is not lawful, and doth put out him who hath an estate of freehold at the least, although he that so doth enter, hath right and title to the land, as in sect. 385: and in vulgar speech he may be called an oppressor, for he doth not put in practice that injury covertly and secretly, by fraud and collusion underhand, as the deceiver and extortioner doth; but by plain and open wrong, and doth stand in the face of all his beholders; and therefore of a disseisor it is said, *venit tanquam in arendā*. 3 Co. 76. *Odinus accipitrem quia semper venit in armis*: 7 Co. 16 b, *Calvin's case*.

§ 280. And it is to be understood, that the nature of joint-tenancy is, that he which surviveth shall have only the entire tenancy according to such estate as he hath, if the jointure be continued, &c. As if three joint-tenants be in fee simple, and the one hath issue and dieth, yet they which survive shall have the whole tenements, and the issue shall have nothing. And if the se-

cond joint-tenant hath issue and die, yet the third which surviveth shall have the whole tenements to him and to his heirs for ever. But otherwise it is of parceners; for if three parceners be, and before any partition made, the one hath issue and dieth, that which to him belongeth shall descend to his issue. And if such parcener die without issue, that which belongs to her shall descend to her co-heirs, so as they shall have this by descent, and not by survivor, as joint-tenants shall have, &c.

The nature of joint-tenants is, that the survivor or survivors should have all the tenancy, according to such an estate, in such plight as they had when the joint-tenancy did continue; and the issue of him that died shall not inherit as heir of the part of him that died so seised of a joint estate of inheritance, which is not so amongst parceners. But if three parceners be, and before any partition made, one of them hath issue, and dieth, her part shall descend to her issue, as heir unto her mother, and her issue may occupy in common with her aunts, the other parceners: and in case any of the parceners die without issue, then the parceners, as sisters and co-heirs to her, shall have her part by descent (if they be of the whole blood to her), otherwise it shall go to the lord by escheat; for coparceners claim not by survivorship, as joint-tenants do. And note, that this manner of joint conveyance is much used in purchasing of lands and tenements, of purpose to free the said lands from incumbrances, that otherwise it might be charged with by any of the joint-tenants; as title of dower to the wife of the purchaser, or recognizances, or statutes acknowledged by him, that would hinder the sale of them, or other conveyance of his, if that be his intent and purpose. Also if the father and the son, or other heir apparent, do purchase lands holden *in capite*, with the proper money of the father, the father dieth, the survivor shall not be in ward, nor pay a relief, nor primer seisin. *Nota 8 Co. 63 b*, of an office to be granted to two *pro termino vitarum suarum* without more words; by the death of one of them the grant is void and determined; for being an office of trust, no survivor shall be of it; and therefore it is necessary to add these words, *conjunctim et divisim, et alterius eorum diutius viventis*. *11 Co. 3 b, Auditor Curle's case.*



§ 281. And as the survivor holds place between joint-tenants, in the same manner it holdeth place between them which have joint estate or possession with another of a chattel, real or personal. As if a lease of lands or tenements be made to many for term of years, he which survives of the lessees, shall have the tenements to him only during the term by force of the same lease. And if a horse, or any other chattel personal, be given to many, he which surviveth shall have the horse only.

And as the survivor doth take place where lands or tenements are purchased jointly, so it is amongst them that have a joint estate or possession with others of chattels real or personal. But note, that some cases of joint-tenancy do not admit of survivorship to take place; as if a lease be made to three at will, one dieth, nothing doth survice: 5 Co. 10 a: if an office be granted to two *pro termino vitarum suarum*, by the death of one of them the grant is void; for being an office of trust, no survivorship shall be of it: 11 Co. 3 b: and therefore these words *conjunctim et divisim et alterius eorum diutius viventium* are very material. If the lord grant his seignory to his tenant, and to a stranger, there shall be no joint-tenancy, nor survivor. *Sir John Davis*, 5 a. But the case is in 5 Co. 9 b, if a lease be made to J. S. for a hundred years, if A., B., and C. do so long live, in this case, if one of them die, the lease is determined; for the lease was conditional, and not determinable by limitation of an estate. *Vide ibid.* 13 a. But if a lease be made to J. S. and his assigns for his life, and during the lives of B. and C., by the death of any of them, the lease doth not determine; for it is not a condition but a limitation.

§ 282. In the same manner it is of debts and duties, &c. for if an obligation be made to many for one debt, he which surviveth shall have the whole debt or duty. And so it is of other covenants and contracts, &c.

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If an obligation be made to divers for debt, he that doth survive of the debtors shall have all the debt or duty; and so it is of other covenants and contracts. Obligation of 200*l.* is made to two, sol-

*vendum his, scilt.* 100*l.* to one, the other 100*l.* to the other, one of the obligees dieth, and his executor sueth for the one 100*l.* if the entire 200*l.* shall accrue to the survivor? *Quære in Dyer*, 350 *a*, and 3 *Co.* 14 *b.* If two be bound in an obligation, and one of the obligors dieth, the charge shall survive; *quod nota*: but *vide Bro. tit. Joint-tenants*, 55; if two be bound in an obligation, and one of them dieth, the other shall pay the whole debt, if the obligee will, or he may bring his action against the survivor, and the executor of the others, if he will; and if both the obligees die, he may have his action against the executors of both.

§ 283. Also, there may be some joint-tenants, which may have a joint estate, and be joint-tenants for term of their lives, and yet have several inheritances. As if lands be given to two men and to the heirs of their two bodies begotten, in this case the donees have a joint estate for term of their two lives, and yet they have several inheritances; for if one of the donees hath issue and die, the other which surviveth shall have the whole by the survivor for term of his life, and if he which surviveth hath also issue and die, then the issue of the one shall have the one moiety, and the issue of the other shall have the other moiety of the land, and they shall hold the land between them in common, and they are not joint-tenants, but are tenants in common. And the cause, why such donees in such case have a joint estate for term of their lives, is, for that at the beginning the lands were given to them two, which words, without more saying, make a joint estate to them for term of their lives. For if a man will let land to another by deed, or without deed, not making mention what estate he shall have, and of this make livery of seisin, in this case the lessee hath an estate for term of his life; and so in as much as the lands were given to them, they have a joint estate for term of their lives. And the reason why they shall have several inheritances is this, in as much as they cannot by any possibility have an heir between them engendered, as a man and woman may have, &c. the law wills that their estate and inheritance be such as is reasonable, according to the form and effect of the words of the gift, and this is to the heirs

which the one shall beget of his body by any of his wives, and to the heirs which the other shall beget of his body by any of his wives, &c. so as it behoveth by necessity of reason, that they have several inheritances. And in this case if the issue of one of the donees, after the death of the donees, die, so that he hath no issue alive of his body begotten, then the donor or his heir may enter into the moiety as in his reversion, &c. although the other donee hath issue alive, &c. And the reason is, forasmuch as the inheritances be several, &c. the reversion of them in law is several, &c. and the survivor of the issue of the other shall hold no place to have the whole.

§ 284. And as it is said of males, in the same manner it is where land is given to two females, and to the heirs of their two bodies engendered.

If lands be given to two men, and the heirs of their two bodies begotten, in this they have a joint estate for term of their two lives; because in the beginning the land was given to them two, which words, without more, doth make an estate to them for term of their lives. *Perk. 25 a.* But in this case they have several inheritances, the consequent whereof is, that when one of them dieth, all shall survive to him during [his life] only, and the moiety or part of him that died shall not immediately descend to his issue; but at the death of the survivor each of their issues shall inherit, and shall hold the land in common, and are not joint-tenants; for each of them doth claim as heir of the body of their fathers; for they have several inheritances, because by one possibility they cannot have one heir between them: and in 8 *Ass. pl. 33*, a gift is made to Mary and John, *et hæredibus eorum legitime procreatis*, but the husband of her that dieth first shall not be tenant by the curtesy, because they had a joint estate in the land for life, and several inheritances; 77 *E. 3. 51 a*; and see the book 7 *H. 4. 16, 18. 44 E. 3. 13*, that if lands be given to a man and his daughter or mother in tail, they have joint estates for lives, and several inheritances, so that their issues lawfully engendered by others respectively inherit;

for though nature make a child in that case, yet it is the law that maketh an heir, which cannot be between them. 8 Co. 87 a. But it is holden in 15 H. 7. 10 b, if lands be given to a man who is married, and to a woman who is also married to another man, to have and to hold to them and to the heirs of their two bodies begotten, this is a good estate tail respectively; because they may after marry by possibility, that is to say, after the death of the wife of the man, and the husband of the wife: but in the same case it is resolved, 10 Co. 50 b, that if lands are given to a man and two women, there the law doth not intend that first he shall marry with the one, and after she shall die, and then he shall marry with the other; and therefore they have several inheritances at the beginning; and note, that as their estates in the tail were several, so the reversion of them is several (1).

§ 285. Also, if lands be given to two and to the heirs of one of them, this is a good jointure, and the one hath a freehold, and the other a fee simple. And if he which hath the fee dieth, he which hath the freehold shall have the entirety by survivor for term of his life. In the same manner it is, where tenements be given to two, and the heirs of the body of one of them engendered, the one hath a freehold, and the other a fee tail, &c.

Concerning this case, and for the full understanding thereof, note, that in 2 Co. 60 b, this diversity was taken; when the fee simple is limited by one self-same conveyance, in that case the one of them may have fee simple, and the other joint estate for life; but when they be tenants for life at first, and one of them doth afterwards purchase the reversion in fee simple, or it doth descend unto him, the jointure is severed; as if a man doth make an estate to three, and to the heirs of one of them, there one of them only hath the fee simple, and nevertheless they three have estates for their lives jointly; for all this is but one estate created at one time, and therefore the fee simple cannot merge or drown the jointure, which did take effect with the creation of the remainder in fee. But

(1) See Co. Lit. 184 a.—Ed.

when three be joint tenants for their lives, and one of them doth purchase the fee, or the fee doth descend unto him, there the fee simple doth merge the joint estate for life; for the estate for life was in *esse* before, and may well be drowned or surrendered; for in that case *terminus et feodum non possint stare in uno eodem personâ*. *Sir John Davies' R. 4 b.* And in the first case when an estate is made to three, and to the heirs of one of them, he that hath the fee cannot grant his remainder, and continue in himself an estate for life, as it is holden in *12 E. 4. 2 b.* And in *2 Co. 61 a,* and *50 E. 3. 3 b,* if two purchase jointly, to the one in fee, to the other for life, and he that hath for life doth waste, the other shall punish him for that waste; *Kirton*; I do grant that case, and the reason is, because of the joint purchase; but when a tenant for term of life hath solely his estate, the remainder over in fee tail, it is reason that the remainder in tail should punish the tenant for life; for the wrong is principally done unto him who is next to the tenancy, and that is the next in remainder. In this case of *Littleton*, if he that hath fee die, his heir within age shall be in ward. *Dyer, 10 a.*

§ 286. Also, if two joint-tenants be seised of an estate in fee simple, and the one grants a rent-charge by his deed to another out of that which belongeth to him, in this case during the life of the grantor the rent-charge is effectual; but after his decease the grant of the rent-charge is void, as to charge the land, for he which hath the land by survivor, shall hold the whole land discharged. And the cause is, for that he which surviveth claimeth and hath the land by the survivor, and hath not, nor can claim any thing by descent from his companion, &c. But otherwise it is of parceners, for if there be two parceners of tenements in fee simple, and before any partition made the one chargeth that which to her belongeth by her deed with a rent-charge, &c. and after dieth without issue, by which that which belongeth to her descends to the other parcener, in this case the other parcener shall hold the land charged, &c. because she came to this moiety by descent, as heir, &c.

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The condition of *survivor proper*, amongst joint-tenants, is, to have all that which was in jointure at the time in plight free, and discharged of incumbrances, done or acknowledged by the other joint-tenants in their life-time; and the case of a rent-charge granted by one of them before his death, is here put for an example; and the reason hereof is, because he that doth survive doth claim, and hath the law by survivor, and hath it not nor can claim any thing therein by descent from his companion; as before appeareth, sect. 280. But see 6 Co. 79, that if joint-tenants in fee be, and the one doth grant a rent-charge in fee, and after doth release unto the other, in this case, although to some intents he to whom the release is made is in by the first feoffor, and no degree is made between them, yet as unto the grantee of the rent-charge, he is under the joint-tenant who did release; for he that doth survive shall not avoid it, after the death of him that did release; for he that did survive, by the acceptance of release, hath deceived himself, from the way and means to avoid the charge; for the right of survivorship is utterly taken away by the release(1). 6 Co. 79. If one joint tenant do acknowledge a statute, and his part is extended after he dieth, *quare* if the land shall continue charged as of a lease made by him, or be discharged as of a rent-charge granted by him or not: 2 Co. 60 b: in what cases one joint-tenant may prejudice his companion, and in what not.

§ 287. Also, if there be two joint-tenants of land in fee simple within a borough, where lands and tenements are devisable by testament, and if one of the said two joint-tenants deviseth that which to him belongeth by his testament, &c. and dieth, this devise is void. And the cause is, for that no devise can take effect till after the death of the devisor, and by his death all the land presently cometh by the law to his companion, which surviveth, by the survivor; the which he doth not claim, nor hath any thing in the land by the devisor, but in his own right by the survivor according to the course of law, &c. and for this cause such devise is void. But otherwise it is of parceners seised of tenements devisable in like case of devise, &c. *causâ quâ supra*.

(1) See Co. Lit. 185 a.—Ed.

This case doth also prove the difference between joint-tenants and parceners; for parceners have divided parts, and several in the eye of the law, even before partition, so that every part may be charged with a rent, recognizance, or tenancy by the curtesy, &c.; but joint-tenants are so conjoined in estate, that the said [estate] cannot be charged; for the survivor, who should bear the burthen, doth not claim under him that made the charge, or as heir to him, but as continuing in his former joint estate, which he had before the charge, and in survivorship of the estate; and for that reason is this case: if two joint-tenants were in a borough, where lands [are] devisable by custom, (for by the order of the common law, without such particular custom, no lands were devisable by last will) and if one of them do devise that, that unto him doth appertain, to another, yet such a devise shall not prejudice the surviving joint-tenant; for the survivor's title is before the devisee's title, that is to say, in the life-time of the devisor, but the title of the devisee hath beginning from the time of the death of the devisor; as before, sect. 168, *omne testamentum morte consummatum est*; and if peradventure it may be conceived by some, that both titles do concur at one instant, yet in all such cases the rule is, that the common law shall be preferred before custom.

§ 288. Also, it is commonly said, that every joint-tenant is seised of the land which he holdeth jointly *per my et per tout*; and this is as much to say, as he is seised by every parcel and by the whole, &c. and this is true, for in every parcel, and by every parcel, and by all the lands and tenements, he is jointly seised with his companion.

It is commonly said, that joint-tenants are seised *per my et per tout*; *vide* the consequence thereof; and therefore it is in 5 Co. 10 a, if a lease be made by three, reserving rent, at will, although one dieth, nothing doth survive in this case; yet forasmuch as every joint-tenant is possessed *per my et per tout*, they shall be charged with the whole rent. If two joint-tenants for life be, and the reversion is granted to I. S., to which one of the joint-tenants only doth attorn, it was agreed by the court, that the attornment of one joint-tenant did vest the whole reversion in the grantee, because the estate of the joint lessees is entire; for every joint-te-

nant is seised *per my et per tout*, and by consequence the reversion which is depending upon such an estate is entire also. 2 Co. 66 b. 5 Co. 10 a. and in *Keilway*, 127 b.

§ 289. Also, if two joint-tenants be seised of certain lands in fee simple, and the one letteth that which to him belongeth to a stranger for term of forty years, and dieth before the term beginneth, or within the term, in this case after his decease the lessee may enter and occupy the moiety let unto him during the term, &c. although the lessee had never the possession thereof in the life of the lessor, by force of the same lease, &c. And the diversity between the case of a grant of a rent-charge aforesaid, and this case, is this. For in the grant of a rent-charge by a joint-tenant, &c. the tenements remain always as they were before, without this, that any hath any right to have any parcel of the tenements but they themselves, and the tenements are in the same plight as they were before the charge, &c. But where a lease is made by a joint-tenant to another for term of years, &c. presently by force of the lease the lessee hath right in the same land (*videlicet*) of all that which to the lessor belongeth, and to have this by force of the same lease during his term. And this is the diversity.

See the diversity between this case, and the other before, sect. 286; and also see sect. 660; and the reason in this present case, and of the diversity is, because the lessee hath a present interest: otherwise it is of a grant to have a lease, if the grantee do pay 10*l.* before Michaelmas next, and if the joint-tenant who made the grant do die before the day; for there is no interest, but a bare commutation, till the money be paid in, as *Plowd.* 263 b: otherwise it is also of a rent-charge granted out of the lands, whereof they be joint-tenants; for that is no interest in the land itself. *Finch. li. 2. fo. 32.* If two joint-tenants be, and one of them doth make a lease for years reserving rent, and dieth, the other that surviveth shall have the reversion of the moiety, but not the rent; for he doth come in by the first feoffor, and not by his companion,



nor under him. *Finch*, 4 b. 1 Co. 91 a. and *Dyer*, 187 a. Note, that he that hath a future interest, as from Michaelmas next, is said to have an *interesse termini*, which cannot be surrendered by express words, but acceptance of a new lease doth drown that *interesse termini*. 10 Co. 52 b. et 67 b.

§ 290. Also, joint-tenants (if they will) may make partition between them, and the partition is good enough; but they shall not be compelled to do this by the law; but if they will make partition of their own will and agreement, the partition shall stand in force.

Joint-tenants were not compellable by the common law to make partition, but if they consented to make partition it was good; but then it was necessary that such partition should be made by deed in writing, especially if it concern an estate of inheritance; for if partition had been made by poll, it was void, and the survivor should take place. *Dyer*, 350 b. And although by the statute 31 H. 8. cap. 1. et 32 H. 8. cap. 32, joint-tenants are compellable to make partition by writ of *partitioe faciendá*, yet a partition made between them by word is void: *vide Dyer*, 350 b: and if it be made by deed or consent, yet it is not in all respects as effectual as a partition made amongst parceners is, as you shall read hereafter; for the statute doth appoint such partition to be made by writ *de partitioe faciendá*, and therefore partition made by them at this day in any other form doth remain as it was at the common law, of the same effect and no otherwise. 6 Co. 12b. The mischief which was at the common law, and the great prejudice which one joint-tenant might do to another, see in the preamble of the statute 31 H. 8. cap. 1. *Dr. et Stu.* 32 b. 2 Co. 68 a. *Plowd.* 247 a. And at this day the same mischief doth continue between them, if partition be not made; *vide* the statute of *Westm.* 2. cap. 22. *cum duo vel tres*, &c. 27 H. 8. 13. *Bro. Waste*, 4.

§ 291. Also, if a joint estate be made of land to a husband and wife and to a third person, in this case the husband and wife have in law in their right but the moiety, and the third person shall have as much as the husband and wife, viz. the other moiety, &c.

And the cause is, for that the husband and wife are but one person in law, and are in like case as if an estate be made to two joint-tenants, where the one hath by force of the jointure, the one moiety in law, and the other, the other moiety, &c. In the same manner it is where an estate is made to the husband and wife and to two other men, in this case the husband and wife have but the third part, and the other two men the other two parts, &c. *causâ quâ suprâ*.

More shall be said of the matter touching joint-tenancy, in the chapter of Tenants in Common, and Tenant by Elegit, and Tenant by Statute Merchant.

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This case doth prove that the husband and wife are but one person in law, as before, sect. 168, and 665; the consequence is, if a joint estate be made to the husband and wife, and one other, the husband and wife hath but one half, and not two parts, and the other shall have as much as the husband and wife, and so if more persons be.

Although the chapter doth end here, yet because it is usual and ordinary that the feoffor from whom the joint estate doth proceed had a warrant annexed to this purchase, or himself did warrant the lands to the joint-tenants, I think it convenient to add something thereof at this time, to the end the young student may fully understand the law concerning that warrant, which is a principal matter concerning all assurances of the lands, which are entire after the partition of the lands made between joint-tenants.

And the case thereof is in 6 Co. (part before mentioned), if two joint-tenants be with warranty, and partition is made between them by judgment in a writ *de partitione faciendâ*, according to the statute, it was adjudged that the warranty doth remain; because by the king's writ they are compellable by the statute (to which every man is party) to make partition, and the party hath pursued his remedy according to the statute, and therefore none can have wrong by that operation of the statute, to which every man is party. But if joint-tenants had made partition by consent by deed, which is warranted by the statute, then such partition had been as a partition between them at the common law, and by consequence the warranty which is entire had been gone: and 38 E. 3. 20 b, the

feoffee with warranty dieth, having two daughters, [who] do make partition of the lands; in this case likewise the warranty shall be divided notwithstanding their partition, which is their own act; for the land did originally come to them by act in law, that is by descent, and they have such partition in that case as the law doth warrant: *lex nemini damnum aut injuriam facit*, and so note the diversity. *Vide Bro. Garranty*, 71. *Finch*, 18.

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### LIB. III. CAP. IV.—TENANTS IN COMMON.

§ 292. Tenants in common are they, which have lands or tenements in fee simple, fee tail, or for term of life, &c. and they have such lands or tenements by several titles, and not by a joint title, and none of them know of this his several, but they ought by the law to occupy these lands or tenements in common, and *pro indiviso* to take the profits in common. And because they come to such lands or tenements by several titles, and not by one joint title, and their occupation and possession shall be by law between them in common, they are called tenants in common. As if a man enfeoff two joint-tenants in fee, and the one of them alien that which to him belongeth to another in fee, now the alienee and the other joint-tenant are tenants in common; because they are in, in such tenements by several titles, for the alienee cometh to the moiety by the feoffment of one of the joint-tenants, and the other joint-tenant hath the other moiety by force of the first feoffment made to him and to his companion, &c. And so they are in by several titles, that is to say, by several feoffments, &c.

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Two marks there are of a tenancy in common of lands and tenements of any estate; the one, their titles must be several; the other, none of them can know their several parts, but their occupation of such lands must be in common, *et pro indiviso*, to take the profits in common, which is distinctly proved by this example; if two joint-tenants be in fee-simple, and one of them doth alien his part unto another in fee, now the alienee and the other joint-tenant are tenants in common; for the alienee doth come in by the feoffment of one of the joint-tenants, and the other doth hold in by the first feoffor: and see the case, sect. 662.

§ 293. And it is to be understood, that when it is said in any book that a man is seised in fee, without more saying, it shall be intended, in fee simple; for it shall not be intended by this word (in fee) that a man is seised in fee tail, unless there be added to it this addition, fee tail, &c.

From this case a rule may be taken, that when two things differing in quality are named in books, pleadings, or common speech, by one word, that which is more eminent than the other shall be understood *propter excellentiam*, and the other lesser quality shall not be taken by construction, unless thereunto be added a special distinction, whereof before in Escuage: *Sect. 99. See a special case, Plowd. 11. Vide Crompton's Justice of Peace, 93a. 20 H. 6. Account, 21.* In a writ of account the plaintiff doth count that the defendant was his receiver from such a feast day until the feast of St. Michael, and sheweth not which feast, and it was adjudged good; for it was taken to be the feast of St. Michael the Archangel; for that is the more honorable feast of St. Michael, *in tumba. See more cases to this effect in Crompton. Ibidem.*

§ 294. Also, if three joint-tenants be, and one of them alien that which to him belongeth to another man in fee, in this case the alienee is tenant in common with the other two joint-tenants: but yet the other two joint-tenants are seised of the two parts which remain, jointly, and of these two parts, the survivor between them two holdeth place, &c.

The first case further explained—if three joint-tenants be, and one of them do alien his part to another in fee, in this the stranger is tenant in common with the other two joint-tenants; for their joint estate is not interrupted by the alienation of the other of them, and the survivor shall take place between them two, who continue in their joint estate.

§ 295. Also, if there be two joint-tenants in fee, and the one giveth that which to him belongeth to another in tail, and the other

giveth that which to him belongs to another in tail, the donees are tenants in common, &c.

Also, if two joint-tenants be of estate in fee simple, and one of them giveth his part to another in tail, and the other joint-tenant do also give his part to another stranger in tail, or any other estate, the donees are now tenants in common.

§ 296. But if lands be given to two men, and to the heirs of their two bodies begotten, the donees have a joint estate for term of their lives; and if each of them hath issue and die, their issues shall hold in common, &c. But if lands be given to two abbots, as to the abbot of Westminster and to the abbot of St. Alban's, to have and to hold to them and to their successors, in this case they have presently at the beginning an estate in common, and not a joint estate. And the reason is, for that every abbot or other sovereign of a house of religion, before that he was made abbot or sovereign, &c. was but as a dead person in law, and when he is made abbot, he is as a man personable in law only, to purchase and have lands or tenements or other things to the use of his house, and not to his own proper use, as another secular man may, and therefore at the beginning of their purchase they are tenants in common; and if one of them die, the abbot which surviveth shall not have the whole by survivor, but the successor of the abbot which is dead shall hold the moiety in common with the abbot that surviveth, &c.

§ 297. Also, if lands be given to an abbot and a secular man, to have and to hold to them, viz. to the abbot and his successors, and to the secular man, to him and to his heirs, they have an estate in common, *caput quâ supra*.

Touching the first part of this section, *vide* sect. 283: but when a feoffment or any other conveyance of land is made to two abbots, they are not joint-tenants, though the words literally taken import so much; for it doth not accord with their capacities to purchase otherwise than to the use of their several monasteries, whereof they

are made abbés and heads, and for that purpose are raised, as it were, from death to life; so it is of lands given to a mayor, commonalty, and their successors, and to J. S.; for J. S. taketh in his own right, and the other in the right of the corporation; and therefore in this case there must be several liveries, in respect of their several capacities, 7 H. 7. 9 b. *per Hussey*, which doth make them tenants in common: *Finch*, 32 b. 16 H. 7. 15 b: and note, that joint words, in respect of the parties, shall be by construction of law taken respectively and severally; 1st, sometimes in respect of the incapacity, and impossibility of the grantee to take jointly, *ut hic*; and sometimes in respect of the several interests of the grantors; and sometimes in respect of the several interests of the grantees; *et sic de cæteris*. 5 Co. 7 b. *et seq.* If an alien and subject born do purchase lands to them and to their heirs, they are joint-tenants, and shall join in an assise, and until office is found for the king, survivorship shall hold place. 5 Co. 52. *Vide Plowd.* 239 a, et 418 b, the case was, a term for years was granted to the wife of him in the reversion, and to another, they are not tenants in common, but joint-tenants; but if chattels personal are given to a *femme couverte* and another, they are tenants in common.

§ 298. Also, if lands be given to two, to have and to hold, *scil.* the one moiety to the one and to his heirs, and the other moiety to the other and to his heirs, they are tenants in common.

If lands be given in this form, *habendum* the one moiety to the one and to his heirs, and the other moiety to the other and his heirs, they be tenants in common by words explanative after, though the first words were joint: *Finch*, 32 b. *accord*: and those last words of *habendum* in deeds, do give estate only, whereof you may read this case and divers other good cases in *Plowden*, 160 a. Note that it is resolved for law, 2 Co. 55 a, that in cases where the *habendum* is not contrary to the premises, or when no certain estate is expressly contained in the premises, but generally, that lands are given and granted, such a grant may be qualified by that *habendum*; for the office of the premises of a charter of feoffment is, to express the grantor and the grantee, and the thing to be granted, and the *habendum* is, to limit the estate that the general implication of the estate which should pass by construction of law by the premises is always controlled and qualified by the *habendum*; as a lease to two,

*habendum* to the one of them for life, doth alter the general implication of joint-tenancy in the freehold, [which] without any *habendum* should have been made. *Vide Dyer, 126 b. et 160 b.* A man is bound to two in 200*l.* *solvendum* the one 100*l.* to one, the other 100*l.* to the other. *Vide 18 Eliz. fo. 350, pl. 20. [Dyer.]*

§ 299. (1) Also, if a man seised of certain lands enfeoff another of the moiety of the same land without any speech of assignment or limitation of the same moiety in severalty at the time of the feoffment, then the feoffee and the feoffor shall hold their parts of the land in common.

§ 300. And it is to be understood, that in the same manner as is aforesaid of tenants in common, of lands or tenements in fee simple, or in fee tail, in the same manner may<sup>f</sup> it be of tenants for term of life. As if two joint-tenants be in fee, and the one letteth to one man that which to him belongeth for term of life, and the other joint-tenant letteth that which to him belongeth to another for term of life, &c. the said two lessees are tenants in common for their lives, &c.

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If joint-tenants be in fee, and one of them doth let unto a man that, that unto him doth appertain for term of life, and the [other] joint-tenant doth let that which to him appertains to another for term of life, the two lessees be tenants in common for their lives; for [by] such a lease for life of the frank-tenement, the jointure was severed, and as their freeholds are several, so the reversion of them in the law is several, and the survivor shall not have all, as in sect. 283. and sect. 302.

§ 301. Also, if a man let lands to two men for term of their lives, and the one grants all his estate of that which belongeth to him to another, then the other tenant for term of life, and he to whom the grant is made, are tenants in common during the time that both the lessees be alive.

(1) This section is copied *verbatim*, without any addition, into the commentary, and need not be repeated.—Ed.

And *memorandum*, that in all other such like cases, although it be not here expressly moved or specified, if they be in like reason, they are in the like law.

If a man doth let lands to two men for the term of their two lives, and the one doth grant all his estate of that which doth to him appertain, to another, in this case the other joint-tenant, and the grantee of the other moiety, are tenants in common during the time that both the first lessees be living; that is to say, the grantee is tenant for term of another man's life, and the other for term of his own life.

§ 302. Also, if there be two joint-tenants in fee, and the one letteth that which to him belongeth to another for term of his life, the tenant for term of life during his life, and the other joint-tenant which did not let, are tenants in common. And upon this case a question may arise; as in such case, admit that the lessor hath issue and die, living the other joint-tenant his companion, and living the tenant for life, the question may be this, Whether the reversion of the moiety which the lessor hath shall descend to the issue of the lessor, or that the other joint-tenant shall have this reversion by the survivor? Some have said in this case, that the other joint-tenant shall have this reversion by the survivor; and their reason is this, *scil.* That when the joint-tenants were jointly scised in fee simple, &c. although that the one of them make an estate of that which to him belongeth for term of his life, and although that he hath severed the freehold of this which to him belongs by the lease, yet he hath not severed the fee simple, but the fee simple remains to them jointly as it was before. And so it seemeth to them, that the other joint-tenant which surviveth shall have the reversion by the survivor, &c. And others have said the contrary, and this is their reason, *scil.* That when one of the joint-tenants leaseth that which to him belongeth, to another for term of his life, by such lease the freehold is severed from the jointure. And by the same reason the reversion which is depending upon the same freehold is severed from the jointure. Also, if the lessor had reserved to him an annual rent



upon the lease, the lessor only should have had the rent, &c. the which is a proof, that the reversion is only in him, and that the other hath nothing in the reversion, &c. Also, if the tenant for term of life were impleaded, and maketh default, after default, the lessor shall be only received for this, to defend his right, and his companion in this case in no manner shall be received, the which proveth the reversion of the moiety to be only in the lessor: and so by consequent, if the lessor dieth living the lessee for term of life, the reversion shall descend to the heir of the lessor, and shall not come to the other joint-tenant by the survivor, *Ideo quære*. But in this case if that joint-tenant which hath the freehold hath issue and dies, living the lessor and the lessee, then it seemeth that the same issue shall have this moiety in demesne, and in fee by descent, for that a freehold cannot, by nature of jointure, be annexed to a reversion, &c. And it is certain, that he which leased was seised of the moiety in his demesne as of fee, and none shall have any jointure in his freehold, therefore this shall descend to his issue, &c. *Sed quære*.

If two joint-tenants in fee be, and one of them do grant that which to him doth appertain unto another for term of life, the tenant for term of life and the other joint-tenant be tenants in common; and although the lessee for life die, living the lessor, and the other joint-tenant who did not let, yet the jointure so broken cannot be re-united again by such matter *ex post facto*; and this is the effect of this large section, as I conceive it; the consequence is, that as the jointure is severed, and a tenancy in common is made thereby, so the descent of the reversion and fee simple shall [be], according to the law of tenants in common, and not as the law is amongst joint-tenants, to the survivor.

§ 303. But if it be so that the law in this case be such, that if the lessor die living the lessee, and living the other joint-tenant which hath the freehold of the other moiety, that the reversion shall descend to the issue of the lessor, then is the jointure and title which any of them may have by the survivor, and the right of the jointure taken away, and altogether defeated for ever. In the same

manner it is, if that joint-tenant which hath the freehold die, living the lessor and the lessee, if the law be so as his freehold and fee which he hath in the moiety shall descend to his issue, then the jointure shall be defeated for ever.

§ 304. And, if three joint-tenants be, and the one release by his deed to one of his companions all the right which he hath in the land, then hath he, to whom the release is made, the third part of the lands by force of the said release, and he and his companion shall hold the other two parts in jointure. And as to the third part which he hath by force of the release, he holdeth that third part with himself and his companion in common.

If three joint-tenants be, and one of them releaseth by his deed to one of his companions all the right which he hath in the land, then hath he, to whom the release was made, the third part of the land by force of the release, and he and his companions do hold the rest in jointure: *vide sect. 294*: as unto the third part, which he had by force of the release, he doth hold it with himself, and his companion in common; for you see, that as unto the third part he holdeth it not by virtue of the joint estate made unto them all three, but by the other new conveyance, and so by several titles; which proveth them to be tenants in common; *vide* and note well what is said 6 Co. 79 a.

§ 305. And it is to be observed, that sometimes a deed of release shall take effect, and enure to put the estate of him which makes the release to him to whom the release is made, as in the case aforesaid, and also, as if a joint estate be made to the husband and wife, and to a third person, and the third person release all his right which he hath to the husband, then hath the husband the moiety which the third had, and the wife hath nothing of this. And if in such case the third release to the wife, not naming the husband in the release, then hath the wife the moiety which the third had, &c. and the husband hath nothing of this, but in right of his wife, because that in this case, the release shall enure to make an estate to whom the release is made, of all that which belongeth to him which maketh the release, &c.

And sometimes a deed of release shall take effect, and shall enure to put the estate from him who maketh the release, to him to whom the release is made; as also if a joint estate be made to the husband and wife, and to a third party, and the third party do release all his right unto the husband, [then hath the husband] that moiety which the third person had, and the wife in that hath nothing by virtue of that release, or conveyance, except a title of dower, which the common law doth give her. *Vide sect. 44.* And if in such case the third person do release to the wife, not naming the husband, then hath she the moiety, which the third person had, and the husband hath nothing therein, only in the right of his wife (except title to be tenant by the curtesy if he have issue by her); because in this case the release doth enure to make an estate to her to whom the release was made of all that appertained to him that made the release: *Keilw. 120 a*: and there by the way it is observable, that though the husband and wife are but one person in law, and it is commonly said that a *femme covert* hath no will, that the commanding power is in the breast of her husband, yet she is capable to purchase in her own name without naming her husband, which shall be good until and unless the husband declareth his dissent and disagreement.

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§ 306. And in some case a release shall enure to put all the right which he who maketh the release hath to him to whom the release is made. As if a man seised of certain tenements is disseised by two disseisors, if the disseisee by his deed release all his right, &c. to one of the disseisors, then he to whom the release is made shall have and hold all the tenements to him alone, and shall oust his companion of every occupation of this. And the reason is, for that the two disseisors were in against the law, and when one of them happeneth the release of him which hath right of entry, &c. this right in such case shall vest in him to whom the release is made, and he is in like plight, as he which hath the right had entered and enfeoffed him, &c. And the reason is, for that he which before had an estate by wrong, *scilicet*, by disseisin, &c. hath now by the release a rightful estate.

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The last case is of a release, whereby an estate in lands doth pass, and is conveyed, from one joint-tenant to another; this case is of a release made to one joint disseisor, whereby the right is conferred to him.

And according is section 472. *et* section 522. If the son and a stranger do disseise the father, and the father dieth, the son being of full age, the son is remitted to all; for the descent is as a release in law, and as strong as a release *in fait*. 11 H. 7. *fo.* 12a.

§ 307. And in some case a release shall enure by way of extinguishment, and in such case such release shall aid the joint-tenant to whom the release was not made, as well as him to whom the release was made. As if a man be disseised, and the disseisor makes a feoffment to two men in fee, if the disseisee release by his deed to one of the feoffees, this release shall enure to both the feoffees, for that the feoffees have an estate by the law, *scilicet*, by feoffment, and not by wrong done to any, &c.

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Note a diversity between this case and the last precedent cases; for this is called a release, which doth enure by way of extinguishment of the right of him that made the release; and not, as in the former two cases, by such a release to convey an estate in the land to him to whom such release was made. The consequence of this release which doth convey by way of extinguishment is, that it shall aid the other joint-tenant, to whom the release was not made, the reason is expressed in the book.

§ 308. In the same manner it is, if the disseisor maketh a lease to a man for term of his life, the remainder over to another in fee, if the disseisee release to the tenant for term of life all his right, &c. this release shall enure as well to him in the remainder, as to the tenant for term of life. And the reason is, for that the tenant for life cometh to his estate by course of law, and therefore this release shall enure and take effect by way of extinguishment of the right of him which releaseth, &c. And by this release the tenant for life hath no ampler nor greater estate than he had before the release made him, and the right of him which releaseth is altogether extinct. And in as much as this release cannot enlarge the estate of the tenant for life, it is reason that this release shall enure to him in the remainder, &c.

More shall be said of releases in the chapter of Releases.

This case as the other [is] named a release which doth enure by way of extinguishment of the right of him that made the release; for tenant for life, and he in the remainder, in this case, and many others, are but one tenant in the law (1); but Sir John Davies saith, *fo. 4 b. reverá* estates in lands and right to lands are things of such substance, which cannot be extinct *aut interire penitus*; and therefore Littleton saith, *sect. 478*, that if the disseisee, when his entry is taken away, do release to the tenant all his right, that this shall not enure by way of extinguishment; but the right which he had doth pass to the tenant by his release; and it would not be convenient that such an ancient right should be extinct; for right cannot die: but what thing properly may be extinct, see there Sir John Davies' book. And it is observable, that one joint-tenant cannot convey his part to any of his companions, because he cannot make livery to him who is already seised *per my et per tout*. *Perk. 40 a.*

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§ 309. Also, if two parçeners be, and the one alieneth that which to her belongeth to another, then the other parçener and the alienee are tenants in common.

§ 310. Also, note, that tenants in common may be by title of prescription, as if the one and his ancestors, or they whose estate he hath in one moiety have holden in common the same moiety with the other tenant which hath the other moiety, and with his ancestors, or with those whose state he hath undivided, time out of mind of man. And divers other manners may make and cause men to be tenants in common, which are not here expressed, &c.

§ 311. Also, in some case tenants in common ought to have of their possession several actions, and in some cases they shall join in one action. For if two tenants in common be, and they be disseised, they must have two assises, and not one assise; for each of them ought to have one assise of his moiety, &c. And the reason is, for that the tenants in common were seised, &c. by several titles. But otherwise it is of joint-tenants; for if twenty joint-tenants be,

(1) Disseisor maketh a lease for life, with a remainder, rendering rent, the disseisee doth accept the rent of the

lessee for life, this is a confirmation of the remainder likewise. *Sed quære.*—*Note in MS.*

and they be disseised, they shall have in all their names but one assise, because they have not but one joint title.

Note that one joint-tenant may have an assise against his joint companion, which see 6 Co. 12 *b*, 13 *a*.

§ 312. Also, if three joint-tenants be, and one release to one of his fellows all the right which he hath, &c. and after the other two be disseised of the whole, &c. in this case the two others shall have several assises, &c. in this manner, *scil.* they shall have in both their names an assise of the two parts, &c. because the two parts they held jointly at the time of the disseisin. And as to the third part, he to whom the release was made, ought to have of that an assise in his own name, for that he (as to the same third part) is thereof tenant in common, &c. because he cometh to this third part by force of the release, and not only by force of the jointure.

*Vide Perkins, 19.a.* He to whom the release is made is in [in] the *per*, for the third part, for which the release is made.

§ 313. Also, to the suing of actions which touch the realty, there be diversities between parceners which are in by divers descents, and tenants in common. For if a man seised of certain land in fee hath issue two daughters and dieth, and the daughters enter, &c. and each of them hath issue a son, and die without partition made between them, by which the one moiety descends to the son of the one parcener, and the other moiety descends to the son of the other parcener, and they enter and occupy in common and be disseised, in this case they shall have in their two names one assise, and not two assises. And the cause is, for that albeit they come in by divers descents, &c. yet they are parceners, and a writ of partition lieth between them. And they are not parceners, having regard or respect only to the seisin and possession of their mothers, but they are parceners rather, having respect to the estate which descended

from their grandfather to their mothers, for they cannot be parceners, if their mothers were not parceners before, &c. And so in this respect and consideration, *scil.* as to the first descent which was to their mothers, they have a title in parcenary, the which makes them parceners. And also they are but as one heir to their common ancestor, *scil.* to their grandfather, from whom the land descended to their mothers. And for these causes, before partition between them, &c. they shall have an assise, although they come in by several descents.

This case of parceners is agreed according to Littleton, in *Dyer*, 368 *a*; and hereupon another case is put, viz. if a grandfather, two daughters, and their two sons be, the grandfather is bound for him and his heirs, and dieth, leaving assets, the daughters do enter, [and die without partition made between them, the sons enter] they shall be charged; which doth prove that the heir of the first heir shall be charged, so long as the assets do descend: contrary by *Plowd.* 441 *a*.

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§ 314. Also, if there be two tenants in common of certain lands in fee, and they give this land to a man in tail, or let it to one for term of life, rendering to them yearly a certain rent, and a pound of pepper, and a hawk or a horse, and they be seised of this service, and afterwards the whole rent is behind, and they distrain for this, and the tenant maketh rescous. In this case as to the rent, and pound of pepper they shall have two assises, and as to the hawk or the horse but one assise. And the reason why they shall have two assises as to the rent and pound of pepper is this, insomuch as they were tenants in common in several titles, and when they made a gift in tail or lease for life, saving to them the reversion, and rendering to them a certain rent, &c. such reservation is incident to their reversion; and for that their reversion is in common, and by several titles, as their possession was before the rent and other things which may be severed, and were reserved unto them upon the gift, or upon the lease, which are incidents by the law to their reversion, such things so reserved were of the

nature of the reversion. And in as much as the reversion is to them in common by several titles, it behoveth that the rent and the pound of pepper, which may be severed, be to them in common, and by several titles. And of this they shall have two assises, and each of them in his assise shall make his plaint of the moiety of the rent, and of the moiety of the pound of pepper. But of the hawk or of the horse, which cannot be severed, they shall have but one assise, for a man cannot make a plaint in an assise of the moiety of a hawk, nor of the moiety of a horse, &c. In the same manner it is of other rents and of other services which tenants in common have in gross by divers titles, &c.

*Nota, Bro. Preservation,* 44, where he saith, that every of the tenants in common by their reservation should not have 2s. and one pound of pepper, nor two sparrowhawks, nor two horses, by any cause or reason of their several titles in common; *and Perk. according*, 22 b; for the reservation is their own deed, and they [shall] have no more than they did reserve.

§ 315. Also, as to actions personals, tenants in common may have such action personals jointly in all their names, as of trespass, or of offences which concern their tenements in common, as for breaking their houses, breaking their closes, feeding, wasting, and defowling their grass, cutting their woods, for fishing in their piscary, and such like. In this case tenants in common shall have one action jointly, and shall recover jointly their damages, because the action is in the personalty, and not in the realty, &c.

Note, though tenants in common must join in personal actions, and recover damages jointly, as in this place is said, yet the judgment for the damages shall be given for the one, and for the other, according to their several parts; whereof see 2 R. 3. 16 a, by *Fairfax and Hussey*; and tenants in common may join in an action upon the statute of [5] R. 2. 21 II. 7. 22 a.



§ 316. Also, if two tenants in common make a lease of their tenements to another for term of years, rendering to them a certain rent yearly during the term, if the rent be behind, &c. the tenants in common shall have an action of debt against the lessee, and not divers actions, for that the action is in the personalty.

Of this *vide sect.* 314.

§ 317. But in an avowry for the said rent, they ought to sever, for this is in the realty, as the assise is above.

§ 318. Also, tenants in common may well make partition between them if they will, but they shall not be compelled to make partition by the law; but if they make partition between themselves by their agreement and consent, such partition is good enough, as is adjudged in the Book of Assises.

Concerning this matter, read what is concerning partition amongst joint-tenants by the order of the common law, *sect.* 290.

§ 319. Also, as there be tenants in common of lands and tenements, &c. as aforesaid, in the same manner there be of chattels reals and personals. As if a lease be made of certain lands to two men for term of twenty years, and when they be of this possessed, the one of the lessees grant that which to him belongeth to another during the term, then he to whom the grant is made and the other shall hold and occupy in common.

§ 320. Also, if two have jointly the wardship of the body and land of an infant within age, and the one of them grant to another that which to himself belongeth of the same ward, then the grantee, and the other which did not grant, shall have and hold this in common, &c.

§ 321. In the same manner it is of chattels personals. As if two have jointly by gift or by buying, a horse or an ox, &c. and the one

grant that which to him belongs of the same horse or ox to another, the grantee, and the other which did not grant, shall have and possess such chattels personals in common. And in such cases, where divers persons have chattels real or personal in common, and by divers titles, if the one of them dieth, the others which survive shall not have this as survivor, but the executors of him which dieth shall hold and occupy this with them which survive, as their testator did or ought to have done in his life-time, &c. because that their titles and rights in this were several, &c.

In this case in our books, opinion hath been against Littleton; as *Keilw.* 115 *b.* *Vide librum 11 H. 4. fo. 13 a, b;* but the law is with Littleton, and he had the sight of these books before he did frame his books, and the opinion of all the court doth agree with Littleton in *Fitz. Trespass*, 178, in a case of two tenants in common of a ship. And in this case is touched that chattels do belong to the executors of the owners or proprietors of them. *See sect. 740.*

§ 322. Also, in the case aforesaid, as if two have an estate in common for term of years, &c. the one occupy all, and put the other out of possession and occupation, he which is put out of occupation shall have against the other a writ of *ejectione firmæ* of the moiety, &c.

§ 323. In the same manner it is where two hold the wardship of lands or tenements during the nonage of an infant, if the one oust the other of his possession, he which is ousted shall have a writ of *ejectment de gard* of the moiety, &c. because that these things are chattels reals, and may be apportioned and severed, &c. but no action of trespass (*videlicet*), *Quare clausum suum fregit, et herbam suam, &c. conculcavit, et consumpsit, &c. et hujusmodi actiones, &c.* the one cannot have against the other, for that each of them may enter and occupy in common, &c. *per my et per tout*, the lands and tenements which they hold in common. But if two be possessed of chattels personals in common by divers titles, as of a horse, an ox, or a cow, &c. if the one take the whole to himself

out of the possession of the other, the other hath no other remedy but to take this from him who hath done to him the wrong to occupy in common, &c. when he can see his time, &c. In the same manner it is of chattels reals, which cannot be severed, as in the case aforesaid, where two be possessed of the wardship of the body of an infant within age, if the one taketh the infant out of the possession of the other, the other hath no remedy by an action by the law, but to take the infant out of the possession of the other when he sees his time.

In these two sections is shewed what actions one tenant in common of chattels real may have against his companion; that is to say, *ejectione firme*, ejectment *de guard*, but no action of trespass *quare vi et armis*, for the reason herein mentioned. *Vide Fard. Poulton, fo. 30.* Yet in special cases one tenant in common may maintain an action of trespass against his companion; whereof see *Theoloall. li. 2. fo. 50 b, and 51 a, et seq. Crompton's Courts, 184; cum duo vel tres, &c.* by which one tenant in common may have an action of waste against his fellow, and so may a joint-tenant by equity of the statute; *27 H. 8. 13 b*; but parceners are not in this case to be construed within the equity of this statute; and there it is said, because parceners might have a writ of partition at the common law, which writ tenants in common or joint-tenants could not have, when this statute of Westm. 2d. was made; but now they also are compellable to make partition by the statute *31 H. 8. cap. 1. 10 H. 7. 16 a.* One tenant in common may have an action of account against his companion for goods; otherwise it is of joint-tenants; and see *6 Co. 68 a.*

§ 324. Also, when a man will shew a feoffment made to him, or a gift in tail, or a lease for life of any lands or tenements, there he shall say, by force of which feoffment, gift, or lease, he was seised, &c. but where one will plead a lease or grant made to him of a chattel real or personal, there he shall say, by force of which he was possessed, &c.

More shall be said of tenants in common in the Chapters of Releases and Tenants by *Elegit*.

This place doth teach us a little before, how the student shall speak and plead in such manner and form as lawyers do, and not according to the vulgar sort; and according see *Dyer*, 70 *a, b*.

And because Littleton saith in the end of this chapter, and also in the last precedent chapter, that his intent was to speak of tenant by *elegit* and tenant by statute merchant, which nevertheless is omitted by him; therefore I have taken occasion now somewhat to speak thereof, following herein Mr. Plowden, 451; who because Bracton (*lib. 2. cap. 31. prope finem*) et Britton do mention in their books that they have made a tree of parentage, by which it may appear plainly how the degree of consanguinity may be accounted, the which figure or tree is not printed in the one book or the other, therefore I have, saith Plowden, here shewed it in the line directly descending and ascending according to the intent of Bracton.

The words of the statute of Westm. 2. cap. 18, which was made anno 13 E. 1, and which was the first statute that doth subject lands unto execution of a judgment, or of a recognizance, which is in nature of a judgment, 3 Co. 12 *a*, and whereby the moiety of the lands are given to the cognizee; *vide the great book of statutes, fo. 41. cap. 18*; these words in the said statute *per rationabile pretium* hath relation unto the chattels, and *extantum* hath reference unto the lands of the cognizor, and this *rationabile pretium* and *extantum* must be found by inquisition and verdict; for so it is implied in law, although it be not so expressed: and if the sheriff do otherwise in making execution by virtue of this statute, it is void. *Note in Palmer's case*, 4 Co. 74: *Dyer*, 100. And concerning these words in the statute, *vicecomes liberet ei medietatem terræ suæ, quousque debitum fuerit levatum*, &c. yet it is as much in law, as if the words had been, shall or may be levied; for inasmuch as the cognizor, or he in the reversion or remainder, cannot enter before the sum be levied, it should otherwise be in the power of the cognizee, or those who are appointed to levy the sum, if they will defer the levying of it, to exclude them in the reversion or remainder from taking the profits of their lands perpetually, which should be inconvenient. *Sir Andrew Corbet's case*, 4 Co. fo. 82 *a*. These words of the statute *liberet ei medietatem terræ debitoris*, by construction of law is, of so much and of all the land which he hath at the time of the judgment given, or at the time after. 47 *Edw. 3. tit. Execution*, 41. The case is, if [in] an action of trespass the plaintiff do recover, the defendant is taken *pro fine regis*, if the

plaintiff pray that the defendant may remain in prison till he have satisfied him, he shall not have an *elegit*, because he hath already made his election, and taken execution of his body, and hath it; but if the defendant die in prison, so that the plaintiff hath not execution with satisfaction, wherein was no default in himself, he may have an *elegit* afterwards, because now he cannot have satisfaction according to his first election, and with this accords *Fitz. N. B.* 146 *b.* 5 *Co.* 87 *b.* *quare.* And in case of *elegit*, the cognizor after satisfaction had may enter; the reason is, because the cognizee shall not have damages and costs, nor any thing but the land only till the debt is satisfied; and because all his certain, the cognizor, after the extent expired, may enter. *Per omnes Justic.* 4 *Co.* 67 *b.* But otherwise it is, if the extent be upon statute merchant, or of the staple, *causa patet*; and in the case before of *elegit*, if the cognizor, or he next in the reversion, do expulse and put out the cognizee, so that he cannot levy or raise his debt according to the extent, then the cognizee may at his election, either have his action against the disturber, and recover his damages, or he may enter again, and hold his extent over beyond the time of his extent. 4 *Co.* 82 *b.*; *vide ibid.* fo. 66. And it was agreed *per totam curiam*, that this statute Westm. 2. cap. 18, which doth give the *elegit*, doth not extend unto the copyholders; for that should be prejudicial to the lord, and against the custom of the manor, that a stranger should have interest in the land holden of him by copy, whereas by custom it cannot be transferred to any without surrender made unto him, and also by the lord allowed and admitted. 3 *Co.* 9 *b.* in *Heydon's case.*

Note, it is at the election of the sheriff either to extend or to sell a lease so long as it remaineth in the hands of the debtor. 8 *Co.* 171 *a.* But if the sheriff is to make execution by *elegit*, which must always be by inquisition, if it be found by such inquisition that the cognizor was possessed of certain lands *pro termino quorundam annorum adhuc ventur'*, this inquisition, which is the groundwork of the execution, is insufficient; for a term cannot be extended without shewing the commencement and the certainty of the term, and the cause thereof is, for that after the debt satisfied, the party is to have again his term, if any part thereof remain, which must appear, and thereupon the party may have his remedy to remove the hands of the king, or other person. And note, in this case of the *elegit*, if this error be committed in the inquisition, although in the further execution by virtue of a *fieri facias* to the

sheriffs directed to levy the money of the goods and chattels of the defendant, the sheriff doth in writing recite uncertain the term, the very beginning hereof, or reciting generally that the cognizor hath a lease *pro termino diversorum annorum adhuc ventur'*, doth sell it, both which are good in law, yet in this case of *elegit* the sale referring is void, though there be no error in the sale made by the sheriff. *Note 4 Co. 74.*

### LIB. III. CAP. V.—ESTATES UPON CONDITION.

§ 325. Estates which men have in lands or tenements upon condition, are of two sorts, viz. either they have estate upon condition in deed, or upon condition in law, &c. Upon condition in deed is, as if a man by deed indented enfeoffs another in fee simple, reserving to him and his heirs yearly a certain rent, payable at one feast or divers feasts *per annum*, on condition that if the rent be behind, &c. that it shall be lawful for the feoffor and his heirs into the same lands or tenements to enter, &c. And if it happen the rent to be behind by a week after any day of payment of it, or by a month after any day of payment of it, or by half a year, &c. that then it shall be lawful to the feoffor and his heirs to enter, &c. In these cases, if the rent be not paid at such time, or before such time limited and specified within the condition comprised in the indenture, then may the feoffor or his heirs enter into such lands or tenements, and them in his former estate to have and hold, and the feoffee quite to oust thereof. And it is called an estate upon condition, because that the state of the feoffee is defeasible, if the condition be not performed, &c.

§ 326. In the same manner it is, if lands be given in tail, or let for term of life or of years, upon condition, &c. —

§ 327. But where a feoffment is made of certain lands reserving a certain rent, &c. upon such condition, that if the rent be behind, that it shall be lawful for the feoffor and his heirs to enter, and to hold the land until he be satisfied or paid the rent behind, &c. in this case if the rent be behind, and the feoffor or his heirs enter, the feoffee is not altogether excluded from this, but the feoffor

shall have and hold the land, and thereof take the profits, until he be satisfied of the rent behind; and when he is satisfied, then may the feoffee re-enter into the same land, and hold it as he held it before. For in this case the feoffor shall have the land but in manner as for a distress, until he be satisfied of the rent, &c. though he take the profits in the meantime to his own use, &c.

§ 328. Also, divers words (amongst others) there be, which by virtue of themselves make estates upon condition; one is the word (*sub condic.*) as if A. enfeoff B. of certain land, to have and to hold to the said B. and his heirs, upon condition that the said B. and his heirs do pay or cause to be paid to the aforesaid A. and his heirs yearly such a rent, &c. In this case without any more saying, the feoffee hath an estate upon condition.

§ 329. Also, if the words were such, Provided always, that the aforesaid B. do pay or cause to be paid to the aforesaid A. such a rent, &c. or these, So that the said B. do pay or cause to be paid to the said A. such a rent, &c. in these cases without more saying, the feoffee hath but an estate upon condition; so as if he doth not perform the condition, the feoffor and his heirs may enter, &c.

§ 330. Also, there be other words in a deed which cause the tenements to be conditional. As if upon such feoffment a rent be reserved to the feoffor, &c. and afterwards this word is put into the deed, That if it happen the aforesaid rent to be behind in part or in all, that then it shall be lawful for the feoffor and his heirs to enter, &c. this is a deed upon condition.

§ 331. But there is a diversity between this word *si contingat*, &c. and the words next aforesaid, &c. For these words *si contingat*, &c. are naught worth to such a condition, unless it hath these words following, That it shall be lawful for the feoffor and his heirs to enter, &c. But in the cases aforesaid, it is not necessary by the law to put such clause, *scilicet*, that the feoffor and his heirs may enter, &c. because they may do this by force of the words aforesaid, for that they contain in themselves a condition, *scilicet*, that the feoffor and his heirs may enter, &c. yet it is commonly used in all such cases aforesaid, to put the clauses in the deeds, *scilicet*, if the rent be behind, &c. that it shall be lawful to the feoffor and his

heirs to enter, &c. And this is well done, for this intent, to declare and express to the common people, who are not learned in the law, of the manner and condition of the feoffment, &c. As if a man seised of land, letteth the same land to another by deed indented for term of years, rendering to him a certain rent, it is used to be put into the deed, that if the rent be behind at the day of payment, or by the space of a week or a month, &c. that then it shall be lawful to the lessor to distrain, &c. yet the lessor may distrain of common right for the rent behind, &c. though such words were not put into the deed, &c.

§ 332. Item, if a feoffment be made upon such condition, that if the feoffor pay to the feoffee at a certain day, &c. 40*l.* of money, that then the feoffor may re-enter, &c. in this case the feoffee is called tenant in mortgage,\* which is as much to say in French as mortgage, and in Latin *mortuum vadium*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not: and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him for ever, and so dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant, &c.

§ 333. Also, as a man may make a feoffment in fee in mortgage, so a man may make a gift in tail in mortgage, and a lease for term of life, or for term of years in mortgage. And all such tenants are called tenants in mortgage† according to the estates which they have in the land, &c.

§ 334. Also, if a feoffment be made in mortgage upon condition, that the feoffor shall pay such a sum at such a day, &c. as is between them by their deed indented, agreed and limited, although the feoffor dieth before the day of payment, &c. yet if the heir of the feoffor pay the same sum of money at the same day to the feoffee, or tender to him the money, and the feoffee refuse to receive it, then may the heir enter into the land; and yet the condition is, that if the feoffor shall pay such a sum at such a day, &c. not making mention in the condition of any payment to be made by his heir, but for that the heir hath interest of right in the con-



dition, &c. and the intent was but that the money should be paid at the day assessed, &c. and the feoffee hath no more loss, if it be paid by the heir, than if it were paid by the father, &c. therefore if the heir pay the money, or tender the money at the day limited, &c. and the other refuse it, he may enter, &c. But if a stranger of his own head, who hath not any interest, &c. will tender the afore-said money to the feoffee at the day appointed, the feoffee is not bound to receive it.

§ 335. And be it remembered that in such case, where such tender of the money is made, &c. and the feoffee refuse to receive it, by which the feoffor or his heirs enter, &c. then the feoffee hath no remedy by the common law to have this money, because it shall be accounted his own folly that he refused the money, when a lawful tender of it was made unto him.

§ 336. Also, if a feoffment be made on this condition, that if the feoffee pay to the feoffor at such day between them limited, 20%. then the feoffee shall have the land to him and to his heirs; and if he fail to pay the money at the day appointed, that then it shall be lawful for the feoffor or his heirs to enter, &c. and afterwards, before the day appointed, the feoffee sell the land to another, and of this maketh a feoffment to him, in this case, if the second feoffee will tender the sum of money at the day appointed to the feoffor, and the feoffor refuseth the same, &c. then the second feoffee hath an estate in the land clearly without condition. And the reason is, for that the second feoffee hath an interest in the condition for the safeguard of his tenancy. And in this case it seems that if the first feoffee after such sale of the land, will tender the money at the day appointed, &c. to the feoffor, this shall be good enough for the safeguard of the estate of the second feoffee, because the first feoffee was privy to the condition, and so the tender of either of them two is good enough, &c.

§ 337. Also, if a feoffment be made upon condition, that if the feoffor pay a certain sum of money to the feoffee, then it shall be lawful to the feoffor and his heirs to enter: in this case if the feoffor die before the payment made, and the heir will tender to the feoffee the money, such tender is void, because the time within which this

ought to be done is past. For when the condition is, that if the feoffor pay the money to the feoffee, &c. this is as much to say, as if the feoffor during his life pay the money to the feoffee, &c. and when the feoffor dieth, then the time of the tender is past. But otherwise it is where a day of payment is limited, and the feoffor die before the day, then may the heir tender the money as is afore-said, for that the time of the tender was not past by the death of the feoffor. Also, it seemeth, that in such case where the feoffor dieth before the day of payment, if the executors of the feoffor tender the money to the feoffee at the day of payment, this tender is good enough; and if the feoffee refuse it, the heirs of the feoffor may enter, &c. And the reason is, for that the executors represent the person of their testator, &c.

§ 338. And note, that in all cases of condition for payment of a certain sum in gross touching lands or tenements, if lawful tender be once refused; he which ought to tender the money is of this quit, and fully discharged for ever afterwards.

§ 339. Also, if the feoffee in mortgage before the day of payment which should be made to him, makes his executors and die, and his heir entereth into the land as he ought, &c. it seemeth in this case that the feoffor ought to pay the money at the day appointed to the executors, and not to the heir of the feoffee, because the money at the beginning trenched to the feoffee in manner as a duty, and shall be intended that the estate was made by reason of the lending of the money by the feoffee, or for some other duty; and therefore the payment shall not be made to the heir, as it seemeth, but the words of the condition may be such, as the payment shall be made to the heir. As if the condition were, that if the feoffor pay to the feoffee or to his heirs such a sum at such a day, &c. there, after the death of the feoffee, if he dieth before the day limited, the payment ought to be made to the heir at the day appointed, &c.

§ 340. Also, upon such case of feoffment in mortgage, a question hath been demanded in what place the feoffor is bound to tender the money to the feoffee at the day appointed, &c. And some have said, upon the land so holden in mortgage; because the condition is depending upon the land. And they have said that if the feoffor

be upon the land there ready to pay the money to the feoffee at the day set, and the feoffee be not then there, then the feoffor is quit and excused of the payment of the money, for that no default is in him. But it seemeth to some that the law is contrary, and that default is in him; for he is bound to seek the feoffee if he be then in any other place within the realm of England. As if a man be bound in an obligation of 20*l.* upon condition indorsed upon the same obligation, that if he pay to him to whom the obligation is made at such a day 10*l.* then the obligation of 20*l.* shall lose his force, and be holden for nothing; in this case it behoveth him that made the obligation to seek him to whom the obligation is made if he be in England, and at the day set to tender unto him the said 10*l.* otherwise he shall forfeit the sum of 20*l.* comprised within the obligation, &c. And so it seemeth in the other case, &c. And albeit that some have said that the condition is depending upon the land, yet this proves not that the making of the condition to be performed, ought to be made upon the land, &c. no more than if the condition were that the feoffor at such a day shall do some special corporal service to the feoffee, not naming the place where such corporal service shall be done. In this case the feoffor ought to do such corporal service at the day limited to the feoffee, in what place soever of England that the feoffee be, if he will have advantage of the condition, &c. So it seemeth in the other case. And it seems to them that it shall be more properly said, that the estate of the land is depending upon the condition, than to say that the condition is depending upon the land, &c. *Sed quære, &c.*

§ 341. But if a feoffment in fee be made, reserving to the feoffor a yearly rent, and for default of payment, a re-entry, &c. in this case the tenant needeth not to tender the rent, when it is behind, but upon the land; because this is a rent issuing out of the land, which is a rent-*seck*. For if the feoffor be seised once of this rent and after he cometh upon the land, &c. and the rent is denied him, he may have an assise of *novel disseisin*. For albeit he may enter by reason of the condition broken, &c. yet he may choose either to relinquish his entry, or to have an assise, &c. And so there is a diversity as to the tender of a rent which is issuing out of the land,

and of the tender of another sum in gross, which is not issuing out of any land.

§ 342. And therefore it will be a good and sure thing for him that will make such feoffment in mortgage, to appoint an especial place where the money shall be paid, and the more special that it be put, the better it is for the feoffor. As if A. enfeoff B. to have to him and to his heirs, upon such condition, that if A. pay to B. on the feast of St. Michael the Archangel next coming, in the cathedral church of St. Paul's, in London, within four hours next before the hour of noon of the same feast, at the rood loft of the rood of the north door within the same church, or at the tomb of St. Erkenwald, or at the door of such a chapel, or at such a pillar, within the same church, that then it shall be lawful to the aforesaid A. and his heirs to enter, &c. in this case he needeth not to seek the feoffee in another place, nor to be in any other place, but in the place comprised in the indenture, nor to be there longer than the time specified in the same indenture, to tender or pay the money to the feoffee, &c.

§ 343. Also, in such case, where the place of payment is limited, the feoffee is not bound to receive the payment in any other place but in the same place so limited. But yet if he do receive the payment in another place, this is good enough, and as strong for the feoffor as if the receipt had been in the same place so limited, &c.

§ 344. Also, in the case of feoffment in mortgage, if the feoffor payeth to the feoffee a horse, or a cup of silver, or a ring of gold, or any such other thing in full satisfaction of the money, and the other receiveth it, this is good enough, and as strong as if he had received the sum of money, though the horse or the other thing were not of the twentieth part of the value of the sum of money, because that the other hath accepted it in full satisfaction.

[In *Peytoe's case*, 9 Co. 79 a, a difference was taken between a condition in a deed to do a collateral act, as to be bound in a statute, to make a feoffment, to yield a true account, *et similia*; for there accord with execution for money or other thing, is no satisfaction to

save the forfeiture of the condition ; for the contract being made (1)] by writing to do such a collateral act, cannot without writing in such case be altered. [But] when the condition in a deed by original contract of the parties is to pay money, there by the agreement of the parties any other thing may be given in satisfaction of the money ; for as the philosopher said, *nummus est mensura rerum commutandarum*. *Lege librum, et nota bene in Dyer, fo. 1 a.* And note, if a man be bound in an obligation of 100*l.*, for payment of 50*l.*, &c. in this case the payment of a lesser sum in satisfaction of a greater cannot be a satisfaction for all, because it doth appear unto the judges that no lesser sum may be a satisfaction to the plaintiff for a greater sum ; but the gift of a horse, a hawk, or a robe, in full satisfaction, is good ; for it shall be intended that the horse, or hawk, or robe, shall be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not accept thereof in satisfaction ; but when an entire sum is due, the acceptance of parcel by no intendment can be a satisfaction to him. But in that case the acceptance of parcel before the day, in satisfaction of all, shall be a good satisfaction, in respect of the circumstance of time ; for peradventure parcel of the money before the day shall be more beneficial than the entire sum at the day, and the value of the satisfaction is not material. For if I am bound in 20*l.* to pay you 10*l.* at Westminster, and you do request me to pay you 5*l.* at the day at York, and you will accept it in full satisfaction of the entire sum of 10*l.*, this is a good satisfaction for all ; [for] the expences to pay it at York, is a sufficient satisfaction (2). *Per curiam. 5 Co. 117 a.* Note a good case in *Dyer, 56 a, b.* Note, by this section it is not always requisite, that in agreements every thing should be performed presently, according to the words.—*Plowd. 291 a.*

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§ 345. Also, if a man enfeoff another upon condition, that he and his heirs shall render to a stranger and to his heirs a yearly rent of

(1) It has been already noticed, that neither the MS. in the Harleian, nor that in the Hargrave collections, are original : this must account for the errors in the present work, and what is more important, for the loss of a considerable portion of the Commentary. The omission of the notes on the Chapter of Parceners by the Custom, would appear to have been the fault of a transcriber ; but in the pre-

sent case the leaves must probably have been lost. At the break in the Harleian MS. is written, " herefrom appear six folios wanting." The next page, it will be observed, begins with a broken sentence ; but as I have hit upon the passage whence it is taken, I have been able to make it complete.—*Ed.*

(2) See Co. Lit. 212 *b.*—*Ed.*

20s., &c. and if he or his heirs fail of payment thereof, that then it shall be lawful to the feoffor and his heirs to enter, this is a good condition: and yet in this case, albeit such annual payment be called in the indenture a yearly rent, this is not properly a rent. For if it should be a rent, it must be rent-service, rent-charge, or a rent-seck, and it is not any of these. For if the stranger were seised of this, and after it were denied him, he shall never have an assise of this, because that it is not issuing out of any tenements, and so the stranger hath not any remedy, if such yearly rent be behind in this case, but that the feoffor or his heirs may enter, &c. And yet if the feoffor or his heirs enter for default of payment, then such rent is taken away for ever. And so such a rent is but as a pain set upon the tenant and his heirs, that if they will not pay this according to the form of the indenture, they shall lose their land by the entry of the feoffor or his heirs for default of payment. And in this case it seemeth that the feoffee and his heirs ought to seek the stranger and his heirs, if they be within England, because there is no place limited where the payment shall be made, and for that such rent is not issuing out of any land, &c.

This section I do omit to write at large, because it is long; but the reader is well to observe it, as it is in the author, and according he may read it cited in *Plowd.* 135, where it is collected upon this case, that the misterming words in an indenture [is] not much material, if so [be] there be words of substance in the said indenture: and of misnomer, note in 6 Co. 64 b, 65 a. And in this place is shewed, that in this case the reservation that was so made payable to the stranger, though *vi termini* it be called a rent, [yet is not properly a rent]; and of that sort are rents that are sometimes reserved upon the demise of fairs, or hundreds, or any other things not manurable. *Vide* 5 Co. 3, *Jewell's case*; and fo. 4, *ibid.* and 7 Co. 23 b. And *nota*, in the 2 Co. 79 b, a diversity when an estate is to be made by the condition to the feoffee, and when to a stranger. *Vide librum.* And by this case Coke, Chief Justice, doth collect and prove, 3 Co. 65, that if a feoffment be made upon condition for the payment of a yearly rent, and the condition is broken, and the feoffor doth bring an assise for the rent, he doth thereby relinquish

and waive the benefit of his re-entry, though it be for the rent due at the same day, which *nota*; and in this place, as in *sect.* 441, special reference to England, *quare* therefore for the certain understanding of that word "*Anglia*," and of the limits of England, and *ibid.* 7. 41, for the Isle of Man; but Wales, by the statute of 12 E. 1, is made parcel, and united and incorporated into England in possession. 7 Co. 42. Calais was never parcel of the realm of England. 7 Co. 42 a. Ireland is not part of England. 7 Co. 43 a.

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§ 346. And here note two things: one is, that no rent (which is properly said a rent) may be reserved upon any feoffment, gift, or lease, but only to the feoffor, or to the donor, or to the lessor, or to their heirs, and in no manner it may be reserved to any strange person. But if two joint-tenants make a lease by deed indented, reserving to one of them a certain yearly rent, this is good enough to him to whom the rent is reserved, for that he is privy to the lease, and not a stranger to the lease, &c.

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Also, that no rent may be reserved but to the lessor, donor, or feoffor, and their heirs, who are privies in blood, and not to any who are privies in estate, as unto those that are in remainder or in reversion, see 8 Co. 71, *vide librum, et nota bene*. But if two joint-tenants make a lease by deed indented, reserving a rent to one of them, this is good enough unto him to whom it is reserved, because he is privy to the lease, and not a stranger to the lease. *Finch*, 1. fo. 4 b. 1 Co. 96 a.

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§ 347. The second thing is, that no entry nor re-entry (which is all one) may be reserved or given to any person, but only to the feoffor, or to the donor, or to the lessor, or to their heirs: and such re-entry cannot be given to any other person. For if a man letteth land to another for term of life by indenture, rendering to the lessor and to his heirs a certain rent, and for default of payment a re-entry, &c. if afterwards the lessor by a deed granteth the reversion of the land to another in fee, and the tenant for term of life attorn, &c. if the rent be after behind, the grantee of a reversion

may distrain for the rent, because that the rent is incident to the reversion; but he may not enter into the land, and oust the tenant, as the lessor might have done, or his heirs, if the reversion had been continued in them, &c. And in this case the entry is taken away for ever; for the grantee of the reversion cannot enter, *causâ quâ suprâ*. And the lessor nor his heirs cannot enter; for if the lessor might enter, then he ought to be in his former state, &c. and this may not be, because he hath aliened from him the reversion.

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By the common law no entry or re-entry might be reserved to any but to the donor, or feoffor, or lessor, or unto their heirs in privity: and such a re-entry cannot be granted to any other person. For if a man let lands to any other for term of life by indenture, reserving to the lessor and to his heirs a certain rent, and for default of payment a re-entry, if after the lessor by deed do grant the reversion of the land to another in fee, and the tenant for term of life do attorn, if the rent be behind afterwards, the reversioner might distrain or have an action of debt, because that the rent is incident to the reversion; but he might [not] enter into the land, and put out the tenant, as the lessor or his heirs might, if the reversion had continued in them, and in this case the re-entry is gone for ever, and for the apparent causes in the book mentioned. But if a man make a lease for years upon condition, that if he do act such an act the lease shall be void, and after he doth grant the reversion over after the condition broken, the grantee may take benefit of the condition, by the order of the common law. But in the like case, if the lease had been for life, then the common law had been otherwise; for a freehold where a *præcipe* lieth, cannot so easily cease, but is avoidable only by entry, after the breach of the condition, which cannot be transferred unto a stranger (1). 3 Co. 65 a, and 8 Co. 95 b. But at this day the law in this point is altered by the statute of 32 H. 8. c. 34; and for the better understanding the said statute, *vide Plowl.* 175 a. *Dyer*, 130 b: but it is observable, that a grantee of a reversion may take advantage of a limitation annexed to a particular estate, though he cannot of a condition.

And it seemeth at this day also at the common law, if a man seised in fee taketh a wife, and maketh a lease for years, reserving a rent

(1) See Co. Lit. 214 b.—*Id.*



upon condition, and dieth, and to her the third part is assigned for dower, she may enter and avoid the lease for her third part, if her rent be not paid; for she is assigned by the law; for a condition, being entire, cannot be apportioned by the act of the party. But in two cases a condition may be apportioned; first, by act in law, second, by act and wrong of the lessee, both which are exemplified, 4 Co. 120, *Dumper's case*.

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§ 348. Also, if lord and tenant be, and the tenant make a lease for term of life, rendering to the lessor and his heirs such an annual rent, and for default of payment a re-entry, &c. if after the lessor dieth without heir during the life of the tenant for life, whereby the reversion cometh to the lord by way of escheat, and after the rent of the tenant for life is behind, the lord may distrain the tenant for the rent behind; but he may not enter into the land by force of the condition, &c. because that he is not heir to the lessor, &c.

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As the grantee of a reversion in the section last before, so the lord by escheat, if the reversion come unto him, may distrain for the rent first reserved, if it be behind in his time; but he cannot enter and take advantage of the condition, which was annexed to the particular estate; for he is not heir unto the feoffor, but cometh unto the reversion by way of escheat, for want of an heir, and so being in by title paramount the lease, he is a stranger to it.

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§ 349. Also, if land be granted to a man for term of two years, upon such condition, that if he shall pay to the grantor within the said two years forty marks, then he shall have the land to him and to his heirs, &c. in this case if the grantee enter by force of the grant, without any livery of seisin made unto him by the grantor, and after he payeth the grantor the forty marks within the two years, yet he hath nothing in the land but for term of two years, because no livery of seisin was made unto him at the beginning;—for if he should have a freehold and fee in this case, because he hath performed the condition, then he should have a freehold by force of

the first grant, where no livery of seisin was made of this, which would be inconvenient, &c. But if the grantor had made livery of seisin to the grantee by force of the grant, then should the grantee have the freehold and the fee upon the same condition.

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This case doth declare, that in conveyances to be made of lands upon condition, it sufficeth not truly to perform the condition, for establishing of his estate, according to the bare words thereof, unless [at] the original creation and foundation of the estate conditional, such other essential ceremonies were also made and done, as the law doth require in that behalf. As for example, if land be granted to a man for a term of two years upon condition, that if he do pay the grantor within two years forty marks, that then he shall have the land to him and to his heirs, in this case if the grantee enter into the land by force of the grant, without livery and seisin first made unto him by the grantor, although he after do perform the condition, yet he hath nothing in the land but for term of two years, to the perfecting of which estate for years livery and seisin is not requisite; but to an estate of freehold or inheritance livery and seisin is necessary. And observe the reason alleged in the book, which is that the inconvenience may be avoided; for otherwise the lessee for two years should have frank-tenement, where no livery and seisin was made unto him; and the best exposition of any case, whether it be upon any matter at the common law, or upon any act of parliament, is so to be made, that one part of the law may stand and agree with the other, which you may read at large exemplified, 5 Co. 112 b, and 7 Co. fo. ult. And according to the reason in this case is sect. 60, where a lease of lands and tenements was made for term of years, the remainder over to another of any estate of freehold or inheritance, and no livery was made to the lessee for years; for those causes are compared to the building of a house without foundation. But sect. 459, if a man make a lease to another for term of years, by force of which lease [the lessee] doth enter into the land, and thereof is possessed, a release made unto him by the feoffor and his heirs is sufficient to convey any estate of freehold and inheritance unto the lessee, according as in the said deed of release is expressed, because of the privity which by force of the release is between them; for in vain it should be in that case to make livery and seisin unto him who had possession of the same lands before by lease.

§ 350. Also, if land be granted to a man for term of five years, upon condition, that if he pay to the grantor within the two first years forty marks, that then he shall have fee, or otherwise but for term of the five years, and livery of seisin is made to him by force of the grant, now he hath a fee simple conditional, &c. And if in this case the grantee do not pay to the grantor the forty marks within the first two years, then immediately after the said two years past, the fee and the freehold is, and shall be adjudged, in the grantor; because that the grantor cannot after the said two years presently enter upon the grantee, for that the grantee hath yet title by three years to have and occupy the land by force of the same grant. And so because that the condition of the part of the grantee is broken, and the grantor cannot enter, the law will put the fee and the freehold in the grantor. For if the grantee in this case makes waste, then after the breach of the condition, &c. and after the two years, the grantor shall have his writ of waste. And this is a good proof then, that the reversion is in him, &c.

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If lands be granted to a man for term of five years, upon condition, if he pay unto the grantor within the two first years forty marks, that then he shall have fee in the land let, or otherwise but for five years, and livery and seisin is made according, in this case he hath fee simple conditional presently, saith Littleton, but all books are against his opinion herein (1). *Perk. fo.* 136. For he doth well perceive that the words are, *per verba de futuro*, that if he do pay, that then he shall have fee; and the Lord Dyer in this case saith expressly, that the opinion of Littleton in this case is not law, which see in *Plowd.* 272 *b*, and *Keilw.* 116 *a*, that if the lessee do waste, or do alien, before the condition by him performed, the lessor shall punish the waste in that case, and enter in the other; but if the grantee do neither the one nor [the other], then by the condition performed it shall have relation to the original time of the lease made, which *nota*; and yet [it] is alleged for argument otherwise, in the *Comm.* 2, 72 *a*. Note, this condition is to increase an

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(1) Lord Coke supports the opinion of Littleton at great length; but states the arguments on both sides fairly. See *Co. Lit.* 216 *b*, *et seq.*—*Ed.*

estate; and of this matter see 8 Co. 78 a, and 75, excellently argued, the *Lord Stafford's case*, and also note the *Lord Lovell's case*, in *Plowd.* 489 a.

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§ 351. But in such cases of feoffment upon condition, where the feoffor may lawfully enter for the condition broken, &c. there the feoffor hath not the freehold before his entry, &c.

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And nevertheless out of the argument made in this case by Littleton, a rule in the law may be learned; when a man hath right to lands or tenements, but he cannot enter lawfully into them without being a trespasser to another, in all such cases the law shall settle a fee, and the frank-tenement in him without other entry, or act; for *fortior est dispositio legis quam hominis*. But in such cases of feoffments upon condition, where the feoffor may enter lawfully, for the condition broken, there the feoffor hath not the freehold before entry.

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§ 352. Also, if a feoffment be made upon such condition, that the feoffee shall give the land to the feoffor, and to the wife of the feoffor, to have and to hold to them and to the heirs of their two bodies engendered, and for default of such issue, the remainder to the right heirs of the feoffor. In this case, if the husband dieth living the wife, before any estate in tail made unto them, &c. then ought the feoffee by the law to make an estate to the wife as near the condition, and also as near to the intent of the condition, as he may make it: that is to say, to let the land to the wife for term of life without impeachment of waste, the remainder after his decease to the heirs of the body of her husband on her begotten, and for default of such issue, the remainder to the right heirs of the husband. And the cause why the lease shall be in this case to the wife alone without impeachment is, for that the condition is, that the estate shall be made to the husband and to his wife in tail. And if such estate had been made in the life of the husband, then after the death of the husband she should have had an estate in tail, which estate is without impeachment of waste. And so it is reason, that as

near as a man can make the estate to the intent of the condition, &c. that it should be made, &c. albeit she cannot have estate in tail, as she might have had if the gift in tail had been made to her husband, and to her in the life of her husband, &c.

This case, as it is in the book, is well to be marked, which Littleton did frame upon the book of 2 H. 4, 5, the search of which original case was made in the record, and is exemplified, 2 Co. 81, *et seq.* And this case amongst others is often alleged to prove, that in performance of conditions the intent of the parties is chiefly to be regarded, and not the word only. *Plowd.* 6 b, 291 a, *qui destruit medium destruit finem.* 10 Co. 51 b, and 8 Co. 90 b, another rule is divulged, *conditio beneficiæ quæ statum construit benignè secundum verborum intentionem, est interpretanda, odiosa autem quæ statum destruit, strictè secundum verborum proprietatem est accipienda*; and it may be collected here, that Littleton's opinion was, that if a lease be made to one *absque impetitione vasti*, that he may have as much interest in the trees, as tenant in tail hath by his estate of inheritance, or tenant in tail after possibility of issue extinct, *whereof before, sect. 34*; but the law in that point was otherwise taken, which you see, 4 Co. 62 b, by the opinion of Wray, Chief Justice, and Manwood, Chief Baron; but the law is according to the opinion of Littleton, *ut patet*, 11 Co. 82, *et seq.* and therefore it was resolved, 6 Co. 37, by construction of the statute 13 El. c. 10, that spiritual persons are restrained to make leases without impeachment of waste, by the equity of the statute. If a man do make a feoffment upon condition, to enfeof two in fee at such a day, and one of them dieth before such a day, the feoffment must be made unto the survivor, and his heirs only, by reason of the intent which is apparent in the condition. *Plowd.* 345 a. 4 H. 7. 3. 15 H. 8. 72 b.

§ 353. Also, in this case, if the husband and wife have issue, and die before the gift in tail made to them, &c. then the feoffee ought to make an estate to the issue, and to the heirs of the body of his father and his mother begotten, and for default of such issue, &c. the remainder to the right heirs of the husband, &c. And the same law is in other like cases: and if such a feoffee will not take such estate, &c. when he is reasonably required by them, which ought to

have the estate by force of the condition, &c. then may the feoffor or his heirs enter.

The last section, and the reason of it, is enlarged farther; if the husband and wife have issue and die, before the gift in tail made [to them, then the feoffee ought to make an estate to the issue and] to the heirs of the body of his father and mother engendered; for such estate tail is good, *as sect. 30.* the remainder to the right heirs of the baron. And that the son, to whom such a gift is made, hath a good estate tail, by such form of gift, and therefore the condition is well performed, see in *Dyer*, 156*a*. But there this case is further put, admitting the eldest son, to whom the estate is made in this form, have also one brother, or more brothers, and afterwards the eldest brother dieth without issue, whether the other brother shall inherit the estate so made in tail, or that the tail is spent, wherein you may see divers opinions (1); and in this case it is principally to be observed, that because there was no day limited, when the feoffee should perform the condition, therefore the death of any of them, to whom the feoffment should be made, doth not make the condition to be forfeited; for in such case the feoffee hath time during his life, if he be not hastened by request by the feoffor or his heirs, and this doth appear by Littleton in this case: and if the reader will be further satisfied, he may read at large in 2 *Co.* 80*a*. *usque ad finem*, and 8 *Co.* 90*b*. 91*a*. And by this, and divers other cases, it may appear, where acts bought to be performed strictly, yet if the intent be performed, that shall suffice, though the words be not performed. *Plowd.* 6*b*.

§ 354. Also, if a feoffment be made upon condition, that if the feoffee shall re-enfeoff many men, to have and to hold to them and to their heirs for ever, and all they which ought to have estate die before any estate made to them, then ought the feoffee to make

(1) In a formedon he must make himself cousin, and heir to the father who is dead. *Eliz.* 247, pl. 76. If lands be given to the two sons (being the youngest) and to the heirs of his father's body begotten, the eldest brother doth take jointly:

3 *E.* 3. 26: as land given to J. S. and his eldest son: 18 *E.* 3. 59: but where the gift is made to the eldest brother, the second is not inheritable. *Vide* 5 *H.* 4. 3. \* 12 *H.* 4. 3. 3 *E.* 3. *Tayle*, 17.

estate to the heir of him which survives of them, to have and to hold to him and to the heirs of him which surviveth.

This case is also another example of the reason of the case before, that the original intent and purpose of the feoffor of the condition is to be performed, and that shall be sufficient and effectual, although the words of the condition be not performed, so that there be not no legal default in him, that should perform the condition; but note 2 Co. 79 b. a diversity agreed, when it is to be made by the condition to the feoffor, and when to a stranger (1); for when the estate is to be made to a stranger, the feoffor ought to do it within convenient time, for he, to whom the feoffment is to be made, being a stranger, is not nor need not make any request to him; for he was [not] party; and when a stranger is to be enfeoffed it is the office of the feoffee in convenient time to require the stranger to limit a time when he will have the feoffment made to him, and at the same time he ought to do and perform it; and in this section appeareth not, whether those that be enfeoffed were strangers, whether they died before the feoffee could enfeoff them, therefore this case must be understood, that it may agree with the diversity aforesaid.

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§ 355. Also, if a feoffment be made upon condition to enfeoff another, or to make a gift in tail to another, &c. if the feoffee before the performance of the condition, enfeoff a stranger, or make a lease for life, then may the feoffor and his heirs enter, &c. because he hath disabled himself to perform the condition, inasmuch as he hath made an estate to another, &c.

But now follow divers cases, where in the law are breaches of the condition, and by consequence therefore the feoffor may re-enter. If a feoffment be made upon condition to enfeoff another, or to make a gift in tail to another; if the feoffee, before performance

(1) Lord Coke observes, that "by the feoffor, for a feoffment over to strangers re-feoffment it is implied to be made to the cannot be said a re-feoffment."—Ed.

of the condition, do enfeoff a stranger, or do make a lease for term of life; then may the feoffor and his heirs enter, because he hath now disabled himself to perform the condition, in that he hath made an estate unto another; and the same is further resolved in this case, that although the feoffee do again purchase those lands and tenements, yet he is not thereby enabled to perform the first conditional assurance, which note in *Sir Anthony Mayne's case*, 5 Co. 21 a. *et vide Lit.* 143 b. [*s.* 355. *et seq.*]

§ 356. In the same manner it is, if the feoffee, before the condition performed, letteth the same land to a stranger for term of years; in this case the feoffor and his heirs may enter, &c. because the feoffee hath disabled him to make an estate of the tenements according to that which was in the tenements, when the estate thereof was made unto him. For if he will make an estate of the tenements according to the condition, &c. then may the lessee for years enter and oust him to whom the estate is made, &c. and occupy this during his term.

Also, in the making of a lease for years, in the case before, the feoffee hath disabled himself to perform the condition, and to make the estate in the tenements according, and in such plight as they were at the time of the conditional feoffment; for if he doth first make a lease, and afterwards make the re-feoffment, then should the lease be good against him, and his feoffee: and therefore the feoffor hath not other means to avoid the incumbrance, but by his re-entry after the condition broken.

§ 357. And many have said, that if such feoffment be made to a single man upon the same condition, and before he hath performed the same condition he taketh wife, then the feoffor and his heirs maintain may enter; because, if he hath made an estate according to the condition, and after dieth, then the wife shall be endowed, and may recover her dower by a writ of dower, &c.; and so, by the taking of a wife, the tenements be put in another



plight than they were at the time of the feoffment upon condition, for that then no such wife was dowable, nor should be endowed by the law, &c.

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Also, if such conditional feoffment be made to a man sole, and after he taketh a wife, this [is] cause of forfeiture; for thereby the tenements are put in another plight than they were at the time of the feoffment: 1 *Co.* 25 *b.* 2 *Co.* 79 *a.* and the reason of this is alleged in 10 *Co.* 49 *b.* because the law hath a principal regard unto the original and fundamental cause; and it may be said that the title of dower is not consummated till the death of the feoffee; and peradventure the wife may die before her husband. And note, this case is one of the exceptions to a general rule taken before, which you may see sect. 337.

§ 358. In the same manner it is, if the feoffee charge the land by his deed with a rent-charge before the performance of the condition, or be bound in a statute staple, or statute merchant, in these cases the feoffor and his heirs may enter, &c. *causâ quâ suprâ.* For whosoever cometh to the lands by the feoffment of the feoffee, they ought to be liable, and put in execution by force of the statute merchant, or of the statute staple. *Questiō.* But when the feoffor or his heirs, for the causes aforesaid, shall have entered, as it seems they ought, &c. then all such things, which before such entry might trouble or encumber the land so given upon condition, &c. as to the same land, are altogether defeated.

In the same manner it is, if the feoffee grant a rent-charge, before the performance of the condition, or be bound in a statute staple, or statute merchant; 2 *Co.* 59 *b.* where it is resolved for law, that when the feoffor, or he to whom the condition should be performed, or any other, do disseise the feoffee upon condition, and during the disseisin the feoffee doth acknowledge a statute or recognizance, that this is not any disability in him, or any cause for the feoffor to re-enter; for the feoffee having only a right, the possession in the hands of the disseisor is not subject to his statute, or recognizance; and therefore no cause of entry given for any disability to the feoffor

in such case. But when the feoffee being in possession doth take a wife, or doth grant a rent-charge, or [acknowledge a] statute, there the land is charged presently, and subject instantly unto the title of dower, rent, or statute: and although it may be objected, that it is not possible that the feoffee may perform the condition, unless he do enter, and if he do enter the land is charged, and therefore he is disabled to perform the condition; yet it was resolved, that it was no disability until he enter in deed, so that the possession of the lands be charged; for if the wife die, or the cognizee do release the statute, then the feoffee may well enter, and perform the condition without any disability in this case of disseisin done unto him.

§ 359. Also, if a man make a deed of feoffment to another, and in the deed there is no condition, &c. and when the feoffor will make livery of seisin unto him by force of the same deed, he makes livery of seisin unto him upon certain condition; in this case nothing of the tenements passeth by the deed, for that the condition is not comprised within the deed, and the feoffment is in like force as if no such deed had been made.

If a man make a deed of feoffment unto another, and in the deed is no condition, and when the feoffor doth make livery of seisin to him of the same land, he doth make it to him upon certain condition; in this case the land doth not pass by the deed, because the condition is not comprised within the deed, and the land cannot pass by the deed without livery and seisin. And so it is said by the Justice of the Common Pleas, if a simple deed be pleaded against a man, and *rei veritate* the livery was made upon condition, that against such a deed a man may plead *rien passa per le fait*, because the feoffment was conditional, which by the livery could not pass by that simple deed: and the same law is against a deed conditional, and the livery simple without condition. 8 H. 5. 8 b.

§ 360. Also, if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void; be-

cause when a man is enfeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void.

It appeareth in the chapter of Fee Simple, that fee simple is the greatest and highest estate of inheritance in the law, and therefore it is repugnant to reason, that such an estate should be restrained with any condition from any the incidents to that estate; for he that hath that estate may by the law alien it to any person; but if such a condition should be good, it would utterly take away all the power, which the law doth give in that case. 6 Co. 41 b. 8 H. 7. 10 b. But some limitations are hereof, as 21 H. 7. 7, if the king giveth lands in fee upon condition he shall not alien, it is good: 5 Co. 56 a: so if a man do enfeoff an infant upon condition that he shall not alien, it is a good feoffment for restraining alienation during his minority, for that were injurious and a wrong to him; but such condition to restrain him after his full age is void, for that were repugnant to the liberty which the law doth give him in this case of fee simple. And if a feoffment in fee be made to the husband and wife upon condition they shall not alien, this is good to restrain their alienation by deed; for this is wrongful; but not to restrain their alienation [by] fine made by them both, for this is lawful, and incident to their estates. 6 Co. 42 a.

§ 361. But if the condition be such, that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, &c. or the like, which conditions do not take away all power of alienation from the feoffee, &c. then such condition is good.

But if the condition be such, that the feoffee shall not alien to such a one, and name his name, or to any his heirs, or such like, because such conditions do not take away all the power of alienation from the feoffee, it is good; as in *Dyer*, 227, if one by his deed

do grant a rent for life, *proviso* that he shall not charge his person, this is a good *proviso*; for the grantees are not utterly and totally restrained thereby from all means which by the law are given to him to recover, and have the effect of his grant; for he may distrain upon the land therefore, for this proviso doth not extend to it. Also, if the rent be behind, and the grantee dieth, his executors shall charge the person of the grantor in an action of debt, this proviso notwithstanding; for otherwise he should be without remedy, which the law will not permit; for the law doth take delight and delectation in giving remedy, as it is said 10 Co. 127 b. Also, if a man grant a rent out of certain lands, this is remediless as to charge the lands; but the grantee may charge the person of the grantor in a writ of annuity; and in this case, if a *proviso* be added, that he shall not charge his person, it is void, unless he do give to him upon the delivery of the deed seisin. \*6 Co. 58 b. *causâ quâ suprà*.

§ 362. Also, if lands be given in tail upon condition, that the tenant in tail nor his heirs shall not alien in fee, nor in tail, nor for term of another's life, but only for their own lives, &c. such condition is good. And the reason is, for that when he maketh such alienation and discontinuance of the entail, he doth contrary to the intent of the donor, for which the statute of W. 2. cap. 1. was made, by which statute the estates in tail are ordained.

§ 363. For it is proved by the words comprised in the same statute, that the will of the donor in such cases shall be observed, and when the tenant in tail maketh such discontinuance, he doth contrary to that, &c. And also, in estates in tail of any tenements, when the reversion of the fee simple, or the remainder of the fee simple is in other persons, when such discontinuance is made, then the fee simple in the remainder is discontinued. And because tenant in tail shall do no such thing against the profits of his issues, and good right, such condition is good, as is aforesaid, &c.

But tenant in tail may be restrained by a condition, that he shall not alien: and so it is agreed 6 Co. 41 b. that if he make a feoffment in fee, or any other estate, by which the reversion is discon-

tinued wrongfully, the donor may enter for the condition broken; for every act which is prohibited by the law, or which doth wrong a man, may be prohibited by condition. 10 H. 7. 11 a. But if the donee suffer a common recovery, the condition cannot by law extend to it, which you may read at large there in Coke's argument, fo. 41 a: and note, *ibidem*, 43 a, if a man make a gift in tail of a manor upon condition, that he shall not make any voluntary grants of any lands by copy according to the custom of the manor, this is not good; but if he make a lease of a manor for life, or for years, with such a condition, it is very good, for the reason there alleged. 10 Co. 39 a, in *Mary Portington's case*.

§ 364. Also, a man may give lands in tail upon such condition, that if the tenant in tail or his heirs alien in fee or in tail, or for term of another man's life, &c. and also that if all the issue coming of the tenant in tail be dead without issue, that then it shall be lawful for the donor and for his heirs to enter, &c. And by this way the right of the tail may be saved, after discontinuance, to the issue in tail, if there be any; so as by way of entry of the donor or of his heirs, the tail should not be defeated by such condition: *quare hoc*. And yet if the tenant in tail in this case, or his heirs, make any discontinuance, he in the reversion, or his heirs, after that the tail is determined for default of issue, &c. may enter into the land by force of the same condition, and shall not be compelled to sue a writ of formedon in the reverter. —

This case must be observed, and it is not much unlike to the former, sect. 350, for any other exposition or explanation I have not read in other books. See 14 H. 8. 15 a.

§ 365. Also, a man cannot plead in any action, that an estate was made in fee, or in fee tail, or for term of life, upon condition, if he doth not vouch a record of this, or show a writing under seal, proving the same condition. For it is a common learning, that a

man by plea shall not defeat any estate of freehold by force of any such condition, unless he showeth the proof of the condition in writing, &c. unless it be in some special cases, &c. But of chattels reals, as of a lease for years, or of grants of wards made by guardians in chivalry, and such like, &c. a man may plead that such leases or grants were made upon condition, &c. without shewing any writing of the condition. So in the same manner a man may do of gifts and grants of chattels personals, and of contracts personals, &c.

§ 366. Also, albeit a man cannot in any action plead a condition which toucheth and concerns a freehold, without shewing writing of this, as is aforesaid, yet a man may be aided upon such condition, by the verdict of twelve men taken at large in an assise of *novel disseisin*, or in any other action, where the justices will take the verdict of twelve jurors at large. As put the case, a man seised of certain land in fee letteth the same land to another for term of life without deed, upon condition to render to the lessor a certain rent, and for default of payment a re-entry, &c. by force whereof the lessee is seised as of freehold, and after, the rent is behind, by which the lessor entereth into the land, and after the lessee arraigns an assise of *novel disseisin* of the land against the lessor, who pleads that he did no wrong nor disseisin, and upon this the assise is taken; in this case the recognitors of the assise may say and render to the justices their verdict at large upon the whole matter, as to say, that the defendant was seised of the land in his demesne as of fee, and so seised, let the same land to the plaintiff for term of his life, rendering to the lessor such a yearly rent payable at such a feast, &c. upon such condition, that if the rent were behind at any such feast at which it ought to be paid, then it should be lawful for the lessor to enter, &c. by force of which lease the plaintiff was seised in his demesne as of freehold, and that afterwards the rent was behind at such a feast, &c. by which the lessor entered into the land upon the possession of the lessee, and prayed the discretion of the justices, if this be a disseisin done to the plaintiff or not; then for that it appeareth to the justices, that this was no disseisin to the plaintiff, insomuch as the

entry of the lessor was congeable on him; the justices ought to give judgment that the plaintiff shall not take any thing by his writ of assise. And so in such case the lessor shall be aided, and yet no writing was ever made of the condition. For as well as the jurors may have conusance of the lease, they also as well may have conusance of the condition which was declared and rehearsed upon the lease.

§ 367. In the same manner it is of a feoffment in fee, or a gift in tail, upon condition, although no writing were ever made of it. And as it is said of a verdict at large in an assise, &c. in the same manner it is of a writ of entry founded upon a disseisin; and in all other actions where the justices will take the verdict at large, there where such verdict at large is made, the manner of the whole entry is put in the issue, &c.

These three sections are thus well abridged by *Finch*, 76 a: conditions annexed to a freehold and inheritance shall not be pleaded unless it be by deed: *Plowd.* 230 b. no more in personal actions than in real. 11 H. 7. 22 b. by *Vavisor*, *quod fuit concessum per curiam*; but a condition annexed to a lease for years, or a grant of ward, or other chattel real, may be pleaded, though the lease or grant were made without deed, yet the jury, upon a general issue pleaded in any cause of freehold, (*scil.*) *nul tort, nul disseisin*, in assise, may find the condition, and thereby the party shall have advantage. And least the reader by this case do peradventure conceive an opinion, that the jury in all causes cannot give a special verdict, or at large, as is here it is called, but in assise; or such general actions; or that the justice may refuse to accept of such special verdict, therefore for his full satisfaction for this herein he may read *Plowd.* 92. 9 Co. 11 b.

§ 368. Also, in such case where the inquest may give their verdict at large, if they will take upon them the knowledge of the law upon the matter, they may give their verdict generally, as is put in their charge; as in the case aforesaid they may well say, that the lessor did not disseise the lessee, if they will, &c.

To this purpose see the statute of Westm. 2. cap. 30, *justiciarii non compellant juratores, dicere præcise, sit disseisina, vel non*, which is but a declaration of the common law, and was so for the relief of the jurors, who upon their oath shall not be compelled to [find] at their peril, things doubtful unto them in law; for the rule is, *quod quisque norit in hoc se exerceat*, and therefore *sicut ad questionem facti non respondent judices, ita ad questionem juris non respondent juratores*. 8 Co. 155. et 9 Co. 13. 11 Co. 10. Nevertheless, if upon the evidence given, it doth appear to the jury, direct matter and proof whereupon they may give a general verdict according to the issue put to them in charge, they may so do, and need not to make thereof a special verdict, as Littleton in this place before sheweth; but if the jurors do take upon them the knowledge of the law, and yet do find the special matter also, and do mistake the law, the judges of the law shall give judgment upon the special matter according to the law, without having regard to the conclusion of the verdict given up by the jurors, who ought not to take upon them the judgment of the law, whereof more at large 11 Co. 10.

§ 369. Also, in the same case, if the case were such, that after that, that the lessor had entered for default of payment, &c. that the lessee had entered upon the lessor, and him disseised; in this case, if the lessor arraign an assise against the lessee, the lessee may bar him of the assise: for he may plead against him in bar, how the lessor, who is plaintiff, made a lease to the defendant for term of his life, saving the reversion to the plaintiff, which is a good plea in bar, insomuch as he acknowledges the reversion to be to the plaintiff. In this case the plaintiff hath no matter to aid himself, but the condition made upon the lease, and this he cannot plead, because he hath not any writing of this; and in as much as he cannot answer the bar, he shall be barred. And so in this case you may see that a man is disseised, and yet he shall not have assise. And yet if the lessee be plaintiff and the lessor defendant, he shall bar the lessee by verdict of the assise, &c. But in this case where the lessee is defendant, if he will not plead the said plea in bar, but plead *nul tort, nul diss.* then the lessor shall recover by assise, *causâ quâ supra*.



This is a special good case of pleading; herein it is said, that in assise the tenant may plead in bar, if the plaintiff did make a lease to the defendant for his life, saving the reversion to himself, which is a good plea in bar, because he doth confess and acknowledge that the reversion is to the plaintiff; for otherwise such a special plea had not been good, but the defendant should have been compelled to have pleaded the general issue; and therefore to the end and purpose he may not hazard his cause upon the verdict of twelve men, he doth make his special plea, giving thereby a colour to the plaintiff; and of the reason and cause, wherefore this form of pleading by giving colour is used in law in this and such other cases, see 6 H. 7. 14*b*. 10 Co. 90*b*.

§ 370. And for that such conditions are most commonly put and specified in deeds indented, somewhat shall be here said (to thee, my son) of an indenture, and of a deed poll concerning conditions. And it is to be understoode, that if the indenture be bipartite, or tripartite, or quadripartite, all the parts of the indenture are but one deed in law, and every part of the indenture is as of great force and effect, as all the parts together be.

What writing in law is to be an indenture doth appear, 5 Co. 20*b*; where it is adjudged, that though the writing be made in two parts, and though the words thereof be written thus, *hæc indentura*, yet this doth not make it an indenture; but to the making of an indenture there must be a manual act of the indenting of the parchment, or paper. *Vide* 6 Co. 48*a*. And in this section Littleton teacheth, that if the indenture be bipartite or quadripartite, all the parts of the indenture are but one deed in law, and every part of the indenture is of as great force and effect, as all the parts together. Indentures, for the most part, are interchangeably, as the mutual deed of every party, but in law all the parts are but one deed, and yet the deed or indented part of the grantor, is the principal, and the other parts are but the counterparts; and therefore if the lessor do seal only, and not the lessee, yet it is as if both or all the parties had sealed; and if any variance happen between the indented parts, it shall be decided and taken as the deed of the grantor is, and the other shall be taken to be the misprision of the scrivener, who did

write it. *Finch, lib. 2. fo. 33 a.* Et note in *Plowd. 134 a.*, that the words of the indenture be the words of both the parties, and though they be spoken as the saying of one of the parties, yet they are not his words only, for thereto is all the consent of the other parties; and therefore when they are written, they shall be taken as the intent of the parties may be understood, and shall not be construed strongly against the one, and beneficial for the other, as the words of a deed poll shall be: for there the words shall be taken most strongly against the grantor, and most available to the grantee: but so it is not in a deed indented, because the law doth make the other party privy to the speaking of them. *Dyer, 6 b.*

And in indentures, and other deeds, commonly you find the premises to contain one distinct sentence; and the *habendum* another; for the knowledge of the several effects of both clauses, *nota 2 Co. 55. and Baldwin's case, ibid. 23.* that the office of the premises of a charter of feoffment [is to express] the grantor, the grantee, and the thing granted, and the office of the *habendum* is to limit the estate. *Plowd. 160.*

And least any opinion should be conceived of the words of Eitleton, that these words are necessary, *in cujus rei testimonium*, &c. the contrary hath been adjudged in *2 Co. fo. 5 a.* and in *Dyer, fo. 19 a. and fo. 22 b.* and in *Keilway, 41 b. and 70 b.* and of the original of sealing of charters with wax in England, thus writeth Ingulphus, who is said to come in with the Conqueror, *ante Normannorum ingressum cirographa firma erant cum crucibus aureis, aliisque signaculis, sed Normannos cum cereâ impressione uniuscujusque specialc sigillum sub intitulatione trium vel quatuor testium conficere cirographa instituere.* *3 Co. Pref. fo. 5 a. Selden, fo. 327, in his Titles of Honor.*

§ 371. And the making of an indenture is in two manners. One is to make them in the third person; another is to make them in the first person. The making in the third person is as in this form:

*This indenture made between R. of P. of the one part, and V. of D. of the other part, witnesseth, that the said R. of P. hath granted, and by this present charter indented confirmed to the aforesaid V. of D. such land, &c. To have and to hold, &c. upon condition, &c. In witness whereof the parties aforesaid to these presents interchangeably have put their seals. Or thus: In witness*

*whereof to the one part of this indenture remaining with the said V. of D., the said R. of P. hath put his seal, and to the other part of the same indenture remaining with the said R. of P. the said V. of D. hath put his seal. Dated, &c.*

Such an indenture is called an indenture made in the third person, because the verbs, &c. are in the third person. And this form of indenture is the most sure making, because it is most commonly used, &c.

§ 372. The making of an indenture in the first person is as in this form:—*To all Christian people to whom these presents indented shall come, A. of B. sends greeting in our Lord God everlasting. Know ye me to have given, granted, and by this my present deed indented, confirmed to C. of D. such land, &c. Or thus: Know all men present and to come, that I, A. of B. have given, granted, and by this my present deed indented, confirmed to C. of D. such land, &c. To have and to hold, &c. upon condition following, &c. In witness whereof, as well I, the said A. of B. as the aforesaid C. of D. to these indentures have interchangeably put our seals. Or thus: In witness whereof I, the aforesaid A. to the one part of this indenture have put my seal, and to the other part of the same indenture the said C. of D. hath put his seal, &c.*

§ 373. And it seemeth that such indenture which is made in the first person, is as good in law as the indenture made in the third person, when both parties have put to this their seals; for if in the indenture made in the third person, or in the first person, mention be made, that the grantor only hath put his seal, and not the grantee, then is the indenture only the deed of the grantor. But where mention is made, that the grantee hath put his seal to the indenture, &c. then is the indenture as well the deed of the grantee as the deed of the grantor. So is it the deed of them both, and also each part of the indenture is the deed of both parties in this case.

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Bracton, lib. 2. cap. 5. fo. 16.

*Re, verbis, scripto, consensu, traditione,*

*Junctura, vestes sumere pacta solent.—Vide in Plowd. 162b.*

§ 374. Also, if an estate be made by indenture to one for term of his life, the remainder to another in fee upon a certain condition, &c. and if the tenant for life have put his seal to the part of the indenture, and after dieth, and he in the remainder entereth into the land by the force of his remainder, &c. in this case he is tied to perform all the conditions comprised in the indenture, as the tenant for life ought to have done in his life-time, and yet he in the remainder never sealed any part of the indenture. But the cause is, for that in as much as he entered and agreed to have the lands by force of the indenture, he is bound to perform the conditions within the same indenture, if he will have the land, &c.

All this case, and reason thereof, is contained in these few words, *qui sentit commodum sentire debet et onus; et contra.* 1 Co. 99. lib. 5. fo. 24. et 10 H. 7. fo. 39. See many good cases put by Brooke, *Debt*, 38. *Vide* 38 E. 3. 8. *bon case.*

§ 375. Also, if a feoffment be made by deed poll upon condition, and for that the condition is not performed, the feoffor entereth and getteth the possession of the deed poll, if the feoffee brings an action for this entry against the feoffor, it hath been a question if the feoffor may plead the condition by the said deed poll against the feoffee. And some have said he cannot, in as much as it seems unto them, that a deed poll, and the property of the same deed, belongeth to him to whom the deed is made, and not to him which maketh the deed. And in as much as such a deed doth not appertain to the feoffor, it seems unto them that he cannot plead it. And others have said the contrary, and have shewed divers reasons. One is, if the case were such, that in an action between them, if the feoffee plead the same deed, and show it to the court, in this case insomuch as the deed is in court, the feoffor may show to the court, how in the deed there are divers conditions to be performed of the part of the feoffee, &c. and because they were not performed he entered, &c. and to this he shall be received. By the same reason when the

feoffor hath the deed in hand, and shew this to the court, he shall well be received to plead it, &c. and namely, when the feoffor is privy to the *fait*, for he must be privy to the deed, when he makes the deed, &c.

§ 376. Also, if two men do a trespass to another, who releases to one of them by his deed all actions personals, and notwithstanding sueth an action of trespass against the other, the defendant may well show that the trespass was done by him and by another his fellow, and that the plaintiff by his deed (which he showeth forth) released to his fellow all actions personals, and demand the judgment, &c. and yet such deed belongeth to his fellow, and not to him. But because he may have advantage by the deed, if he will shew the deed to the court, he may well plead this, &c. By the same reason may the feoffor in the other case, when he ought to have advantage by the condition comprised within the deed poll.

And in 5 Co. 74*b*. it is said, *vide* Littleton, fo. 88. If the tenant in assise do plead a feoffment by deed poll made by the plaintiff, and do shew it unto the court; in this case, for as much as the deed is in court, the feoffor may shew to the court, that in the deed there be divers conditions, &c. but this is to be understood that he shall take advantage of the conditions in the deed in the same term in which it was pleaded, and shewed forth, but not after the same term; read the case *usque ad finem*; and *Ibid.* fo. 76, *The Countess of Pembroke's case*; where it was holden by Popham, Chief Justice, *et totam curiam*, that in the same term the plaintiff may pray, that the deed be entered *in hæc verba*, and after he may demur, and take issue at his pleasure; note a good policy. And in 10 Co. 92*b*. see the reasons and causes, wherefore deeds and instruments pleaded must be shewed forth unto the court; whereof one principal reason is, that if there be in the deed a condition, limitation, or power of revocation, if the deed be poll, or if the plaintiff have not the counterpart of the indenture, yet he may take advantage of them. And *nota*, when a joint trespass is made by divers men to another, if he, to whom the trespass was done, do release but to one of them all actions personal, this shall avail also for the benefit of the other, although peradventure he was not privy nor party to the making of the said deed of release, if he have the said deed to shew in court;

and the like law is in case two or more are bound in an obligation for debt.

§ 377. Also, if the feoffee granteth the deed to the feoffor, such grant shall be good, and then the deed and the property thereof belongeth to the feoffor, &c. And when the feoffor hath the deed in hand, and is pleaded to the court, it shall be rather intended, that he cometh to the deed by lawful means, than by a wrongful mean: And so it seemeth unto them, that the feoffor may well plead such deed poll, which compriseth the condition, &c. if he hath the same in hand. *Ideo semper quære de dubiis, quia per rationes pervenitur ad legitimam rationem, &c.*

*Quære de dubiis, quia per rationes pervenitur ad legitimam rationem;* and in the end of the Epilogues, *lex plus laudatur, quando ratione probatur;* but this must be understood of legal reason. 7 Co. 19a. *Qui rationem in omnibus quærunt, rationem subvertunt.* 2 Co. fo. 75.

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§ 378. Estates which men have upon condition in law, are such estates which have a condition by the law to them annexed, albeit that it be not specified in writing. As if a man grant by his deed to another the office of parkership of a park, to have and occupy the same office for term of his life, the estate which he hath in the office is upon condition in law, to wit, that the parker shall well and lawfully keep the park, and shall do that which to such office belongeth to do, or otherwise it shall be lawful to the grantor and his heirs to oust him, and to grant it to another, if he will, &c. And such condition as is intended by the law to be annexed to any thing, is as strong as if the condition were put in writing. . . .

§ 379. In this manner it is of grants of the offices of steward, constable, beadlery, bailiwick, or other offices, &c. But if such office be granted to a man, to have and to occupy by himself or his deputy, then if the office be occupied by him or his deputy, as it ought by the law to be occupied, this sufficeth for him, or otherwise the grantor and his heirs may oust the grantee, as is aforesaid.

Before hath been declared of conditions expressed; now the author doth speak of conditions which the law doth annex unto certain grants and estates, without any express words in the grant; and such conditions, which are by the law intended to be annexed to any thing, are as strong as if the conditions were put in writing.

The example in this place is, of the keepership of a park for term of his life; for the estate which he hath in the office, is upon condition in law; that is to say, that the keeper do well and lawfully keep the park, and shall do that which to that office doth appertain; and what be forfeitures of the keeper of a park, *vide* in 9 Co. 50 a. and in *lib. 5 E. 4. fo. 27*, to which office two things be requisite; that is to say, first science; for keepers of deer, or other wild beasts, ought to be skilful of their natures, and according to order them; for if they do not know their nature, they cannot satisfy their nature in things requisite, as in their food, of herbage and browse, nor in shadows, or coverts for their repose, nor [tell how] to order them after their hunting, or to rechase, or bring them back, that by hunting or otherwise have escaped out of the park; and in many other things. 2dly, Also they ought to have science in taking of them by nets, toils, dogs, or other engines: and besides this, diligence, which ought to be in a keeper; the grantor of such an office by presumption of law hath in the grantee confidence in his diligence; for otherwise he would not commit his deer to him, which be things that require great diligence and attendance. *Vide Plowd. 379 a.* In 8 Co. 44 b. it is noted (1), that there be two manners of condition, *scil.* conditions *in fait*, that is to say, expressed, as to pay money, or to do, or not to do, any other thing, &c.; and conditions in law, *scil.* implied; also conditions in law be in two natures; that is to say, by the common law; and by statute, and conditions in law by the common law be in two sorts; one, which is founded upon confidence, and skill; and the other, without confidence and skill; conditions in law by statute law are also of two qualities; that is to say, when the statute for the execution of the condition in law doth give a recovery, and when the statute doth give entry, and no recovery; as unto conditions in law which are founded upon skill, and confidence, as office of a parkship, stewardship, &c. in fee, which doth descend unto an infant or *femme coverte*, if the condition in law annexed unto the said office be broken, this doth bar the infant, and *femme coverte*; the same law is of

(1) See Co. Lit. 233 b.—Ed.

liberties and franchises, but if the infant or *femme covert* be lessee for life, or tenant by the curtesy, or tenant in dower, and the infant, or husband of the wife, do make a feoffment in fee, and the lessor do enter for the forfeiture, (as he may) yet this doth not bar the infant, or *femme covert*, but that the infant, or *femme* after the death of her husband, may enter; for this is by force of a mere condition in law, without any skill and confidence annexed to the estate; but if an infant, or *femme covert*, lessee for life, do waste, and the lessor do recover in an action of waste, this shall bind the infant, and *femme covert*; for the statute doth give an action to recover the land: the same law is of a *cessavit*, and other cases like; as if an [infant] be gaoler, and do suffer an escape, there an action doth lie; but if the condition be by force of a statute law, which doth give entry, and no action, as if an infant, or the husband seised in the right of his wife, do alien in mortmain, there, although the lord, of whom the lands are holden, do enter, yet the right of the infant, or *femme covert*, is not utterly barred, no more than in case of a condition in law by the common law, which is founded upon an alienation of the infant tenant for life, or the husband, &c. where entry by the common law is given unto the lessor. *Vide plus in libro.*

And so note, that in such office of skill, science, fidelity, and discretion, regularly such an officer without special words in his patent, or deed, cannot by the law make a deputy. 9 Co. 48 a, b. *Vide* 11 E. 4. 1. and 39 H. 6. 34. *Boucher's case.* But if such office, to be a steward of a manor, or keeper of parks and forests, or such like, be granted to an earl, or other peer of the realm, in such case for the exility of the officer, and the dignity of the person, it is implied in law, for convenience, that he may make a deputy, for whom such nobleman must answer. *Ibid.* 49 a. And it is to be observed, that this word "steward" is derived of two words; that is to say, "*selde*" and "*ward*," and is as much as to say, "in my place," or "for me;" and therefore he is commonly called "a woodward" who hath the custody and charge of woods, and so "hayward" of "my hays," *et sic de similibus*; and *seneschallus* in Latin hath the same signification, as appeareth in the history of Ingulphus, fo. 463. *inter consuetudines Scaccarii*, where the under-sheriff is called *seneschallus vicecomitis*, and for that cause also a great officer within this realm is called the great steward, because the king doth appoint him in divers cases to execute his place. *Ibid.* Also, there is a great diversity between a deputy, and an assignee of an office; for an



assignee is a person who hath an estate or interest in the office itself, and doth all things in his own name, for which his grantor shall not be answerable, but in special cases; but a deputy hath not an estate or interest in the office, but is as only the shadow of the officer; all he doth in the office he doth in the name of the principal officer himself, and not in his own name; and for all such things to be done by him, his grantor shall answer; *tamen, vide Dyer, 287 b. 9 Co. fo. 98 a*; and when an officer hath power to make assigns, he may *impliciter* make deputies; for *cui licet quod majus est, non [debet quod minus est non] licere*; and by consequence, when an office is granted to one and to his heirs, by this he may make an assignee, and by consequence a deputy (1). *Ibid. in 9 Co. 48 b. Et vide plus in libro*; and to this purpose see in *Plowd. 379 a*.

§ 380. Also, estates of lands or tenements may be made upon condition in law, albeit upon the estate made there was not any mention or rehearsal made of this condition. As put the case, that a lease be made to the husband and wife, to have and to hold to them during the coverture between them; in this case they have an estate for term of their two lives upon condition in law, *scil.* if one of them die, or that there be a divorce between them, then it shall be lawful for the lessor and his heirs to enter, &c.

But this is *in rei veritate* a limitation (2), and not a condition, either in *fact* as in case of re-entry, or in law (for which the lessor may enter for a forfeiture. *5 Co. 116, Oland's case*; and *4 Co. 3 a, et fo. 30 a, and Finch, fo. 32 a*. An estate to a woman *durante viduitate sua*, is an estate for life, and because mention is made of divorce, the reader must know that the title, and all matters concerning divorces doth appertain to the sole jurisdiction of the eccle-

(1) Nota in *Dyer, 28 H. 8. fo. 7 b*. A man shall not have an execution upon a statute, of the profits of the office of a filacier in the Common Place, for a man shall never have a thing extended upon an execution, unless he may grant and assign the same thing, which he cannot in this case, for he is an officer to the court,

and doth the business of the court, and not his own business; and this is an office of trust, which cannot be assigned, and so is the law in like case.—*Note in MS.*

(2) So Lord Coke observes "this word (*durante*) is properly a word of limitation." *Co. Lit. 234 b.—Ed.*

siastical court, and not the common law, as you may read in *Caudry's case*, 5 Co. and yet some things touching divorces are mentioned in our books of the common law; and in 7 Co. 43, it is said, that some divorces do dissever matrimony, *scil. à vinculo matrimonii*, and do bastard the issue, and bar the wife of dower, and some but *à mensâ et thoro*, which do not dissolve the matrimony, nor bar the wife of dower, nor bastard the issue (1).

§ 381. And that they have an estate for term of their two lives is proved thus: Every man that hath an estate of freehold in any lands or tenements, either he hath an estate in fee, or in fee tail, or for term of his own life, or for term of another man's life, and by such a lease they have a freehold, but they have not by this grant fee, nor fee tail, nor for term of another's life, *ergo* they have an estate for term of their own lives, but this is upon condition in law, in form aforesaid; and in this case if they shall do waste, the feoffor shall have a writ of waste against them, supposing by his writ, *quòd tenet ad terminum vite*, &c. but in this count he shall declare how and in what manner the lease was made.

§ 382. In the same manner it is, if an abbot make a lease to a man for years, to have and to hold to him during the time that the lessor is abbot; in this case the lessee hath an estate for term of his own life: but this is upon condition in law, *scil.* that if the abbot resign, or be deposed, that then it shall be lawful for his successor to enter, &c.

This is a continuance of the former section, and in the conclusion is declared that the generality of the writ must be made certain by the declaration or count; and according it was resolved in 5 Co. 2d pt. 35: for the declaration or count must be to reduce the generality of the writ into a particularity, and that which is briefly touched in the writ in a certainty, to which the defendant may have a certain answer, and upon which a certain judgment may be given: *quia oportet quod certa res deducatur in iudicium*; and *ibid. fo. 120 b*,

(1) A man counts of a lease for life, *estate pur vie nest durante viduitate*, car and giveth in evidence *durante viduitate*, *cest plus large estate*. 4 Co. 30 a.—Note it is not good. 2 et 3 Eliz. 192. p. 23. in MS.  
*Durante viduitate* [est] *estate pur vie*; mes

and in *Plowd.* 84 and 122: *Plowd.* and in *fo.* 561 *b*, see the like manner of argumentation according to this example.

§ 383. Also, a man may see in the Book of Assizes, *anno* 38 E. 3. p. 3. a plea of assise in this form following, *scil.* An assise of *novel disseisin* was sometime brought against A. who pleaded to the assise, and it was found by verdict, that the ancestor of the plaintiff devised his lands to be sold by the defendant, who was his executor, and to make distribution of the money for his soul; and it was found that presently after the death of the testator, one tendered to him a certain sum of money for the lands, but not to the value; and that the executor afterwards held the lands in his own hands two years, to the intent to sell the same dearer to some other; and it was found, that he had all the time taken the profits of the lands to his own use, without doing any thing for the soul of the deceased, &c. Moubray, Justice, said, the executor in this case is bound by the law to make the sale as soon as he may after the death of his testator, and it is found that he refused to make sale, and so there was a default in him; and so by force of the devise he was bound to put all the profits coming of the lands to the use of the dead, and it is found that he took them to his own use, and so another default in him. Wherefore it was adjudged, that the plaintiff should recover. And so it appeareth by the said judgment, that by force of the said devise, the executor had no estate nor power in the lands, but upon condition in law.

See before, *sect.* 169, where you shall find an apparent diversity between the two cases; that is to say, the frank-tenement is in the executor immediately by force of the devise in the case in this section mentioned; but in the first case the executor had only an authority devised to him to sell the land, and therefore *interim* the frank-tenement and fee simple of necessity must descend to the heir of the devisor. But this case must be understood of a devise in some ancient borough, where by custom lands might be devisable by a man's last will (1); for so he might not do by the order of the

(1) See *Co. Lit.* 236 *a.*—*Ed.*

common law, or before the statute in that case made. 32 H. 8. cap. 1. *Vide* 6 Co. 16 b. *et vide ante*, sect. 167. It was holden by all the court, that executors may retain all the plate or other goods of the testator, so that they do truly pay the value of them to the use of the testator; but if the will be, that the executors shall sell his, &c. in that case the executors cannot retain the lands in their own hands, paying for them the yearly value. *Dyer*, 2 a.

Also, here is taught that the executor ought by the law to perform the devise and intent of the testator, in convenient time, without tedious delay, otherwise the heir of the devisor may enter, by reason of the condition of the law *tacitè* annexed to the devise; and agreeable is 1 Co. 25 b, *et negligentia semper habet comitem infortunium*, it is said in 8 Co. 133 a: and *nota* 20 H. 7. 2. the office of an executor is, to do his office and duty truly, diligently, and lawfully; *vide* 5 Co. 2d part, 37 b. The principal case in this section is in 38 lib. Ass. pl. 3; which see also vouched in *Plowd.* 523 b; and see in *Dyer*, 127 a, concerning a condition in a will.

§ 384. And many other things there are of estates upon condition in law, and in such cases he needed not to have showed any deed rehearsing the condition, for that the law itself purporteth the condition, &c.

*Ex paucis dictis intendere plurima possis.*

More shall be said of conditions in the next chapter, in the chapter of Releases, and in the chapter of Discontinuance.

Conditions in law are also implied in the creation of an earl, count, &c.; for they of such dignity have an office of great trust and confidence, and are created for two purposes; 1st, *ad consulendum regem tempore pacis*; 2dly, *ad defendendum regem et patriam tempore belli*, and therefore antiquity hath given them two ensigns to resemble those two duties; for 1st of all their head is adorned with a cap of honor and coronet, and their body with a robe, in resemblance of counsel; 2dly, they be girt with a sword, in resemblance that they shall be *foial et loyal* to defend their prince and country, 7 Co. 34 a. *Vide librum*.

Although in this chapter no mention is made of any demand to be made by the lessor, before he can enter or take advantage of

the condition broken on the part of the lessee, yet for so much as demand is necessary in such cases, and that the law doth force him to make a demand, or otherwise he shall never [enter], as it is agreed *per curiam* in 20 H. 6. fo. 30, and in *Plowd.* 173 a: therefore I do think it nothing impertinent, in the end of this chapter of Conditions, briefly to add some things concerning that point of demand.

And in 7 Co. 28 b, it is resolved, that in case of re-entry, by which all the interest or estate shall be defeated, or when any sum *nomine pænæ* shall be forfeited, in both these cases demand must be made, and that precisely at the very day of payment, a convenient time before the setting of the sun, in the one case in respect of the condition, and in the other case in respect of the penalty. But if a rent be granted for life, or for term of years, payable at certain feast days, and for default of payment, if it be demanded, that it shall be lawful to the grantee to distrain; in this case of distress also demand is necessary, because of the express words; but the demand may be made at any other time at his pleasure, for no less penalty doth thereby ensue, but only remedy to come to his rent behind, and which is due to him; and so it was adjudged in 2 Co. 31 b. It is resolved, that if a condition of re-entry be annexed to a demise of a house, together with a certain quantity of land for the arrearages of rent, the lessor must make his demand at the house, as being the most principal and notorious thing.

In 4 Co. 72 b, the case was, the Queen Elizabeth did make a lease for years, reserving a rent, payable at the receipt of her exchequer at Westminster, *seu ad manus balivorum, seu receptorum, &c.* with the usual condition to be void for the non-payment of the rent, and after the queen did grant over the reversion to another and his heirs; and the question was, where and in what place the patentee should demand the rent, to the end he may take advantage of the said condition; in which case it was resolved, that the queen needeth not to make a demand, but where she doth grant her reversion, her grantee shall not take advantage of the condition without demand: also it was resolved in this case, that the place where the patentee must demand this rent is, upon the land demised, and not at the receipt at Westminster.

If a common person do make a lease of his manor of D. reserving rent to be paid at his manor of S., with a condition for non-payment, and after he do grant over the reversion of the manor of D., yet the grantee must demand his rent at the manor of S. *Ibid.* See the case in 5 Co. 113 a, b.

Also *nota*, that a condition is entire, and may not be apportioned by the act of the parties; for by the severance of part from the reversion, the condition is destroyed in all. But in two cases a condition may be apportioned; 1st, by act in law; 2dly, by the act or wrong of the lessee, which see at large in 4 Co. 120, and in 5 Co. 55.

### LIB. III. CAP. VI.—DESCENTS.

§ 385. Descents which toll entries are in two manners, to wit, where the descent is in fee, or in fee tail. Descents in fee which toll entries are, as if a man seised of certain lands or tenements, is by another disseised, and the disseisor hath issue, and dieth of such estate seised, now the lands descend to the issue of the disseisor by course of law, as heir unto him. And because the law cast the lands or tenements upon the issue by force of the descent, so as the issue cometh to the lands by course of law, and not by his own act, the entry of the disseisee is taken away, and he is put to sue a writ of *entrie sur disseisin* against the heir of the disseisor, to recover the land.

§ 386. Descents in tail which take away entries are, as if a man be disseised, and the disseisor giveth the same land to another in tail, and the tenant in tail hath issue and dieth of such estate seised, and the issue enter; in this case the entry of the disseisee is taken away, and he is put to sue against the issue of the tenant in tail a writ of *entrie sur disseisin*.

The law anciently hath been a protector of the possessions of man, which they have in their lands and tenements, without regard whether the possession be by rightful title, or by descent; for the law imputeth the folly in him that did lose his possession, if either by valour or some lawful course, he did not freely pursue it, and recover his possession; for the law hath been, that the disseisee could not re-enter without action, unless he had made a present continual claim. See in [Drayton's] *Polioibion*, 270, et 21 E. 3. 2. In ancient times the disseisee could not enter upon the feoffee of the disseisor, for saving of the warranty; but for many years the

law hath been holden otherwise ; and so the common practice yet remaineth. *Egerton's Post-nati*, fo. 49. And there also, fo. 47, it is said, that all human laws are but *leges temporis* ; and afterwards the wisdom of the judges found them to be unapt for the time wherein they lived, although good and necessary when they were made ; and therefore it is said, *leges humanæ nascuntur, vivunt, et moriuntur, et habent ortum, statum, et occasum* ; and for to know the law concerning descents in these our days, read the statute of 32 [H. 8.] cap. 33. *Plowd.* 47.

In this chapter is declared the favour which the law giveth to possessions in lands and tenements, when the possessor thereof doth come thereto by descent, which is by course of law ; for in such case, he that hath rightful title may not enter upon him to dispossess such an heir, but is driven to seek his remedy by action, whereof two examples are here put ; the one of the descent of an estate in fee ; the other of the descent of an estate in tail ; and the means which the disseisee hath in such case is a writ of entry *sur disseisin*. See sect. 486.

If the disseisee do not use the remedy given him by the law, but doth disseise the heir of the disseisor, he doth not gain thereby his ancient right, but only an estate by disseisin : and therefore if the disseisee do make a feoffment in fee to another after such a descent cast on the part of the disseisor, thereby he doth pass that estate only, which he hath gained by disseisin, and hath extinguished his ancient right, for it cannot be transferred to his feoffee ; for there is such extreme and natural enmity between the estate by wrong gained by disseisin, and his ancient right, that the right cannot incorporate itself in the estate by wrong, and pass with it, but rather in such case his rightful estate shall suffer extinguishment, than to pass with it ; [so that] when the heir of the disseisor doth re-enter, he shall retain the lands for ever, as well against the feoffor, who did disseise him, his right notwithstanding, as against his feoffee. 6 *Co.* 70 a. 9 *H.* 7. 25 a. 2 *Co.* 56 a, it is said, if the disseisee do levy a fine to a stranger, that in this case the disseisor shall retain the lands for ever ; for the disseisee, against his own fine, cannot claim the lands, and the cognizee cannot enter ; for the right which the cognizor had, cannot be transferred unto him ; but by the fine, the right is extinct, whereof the disseisor shall take advantage.

§ 387. And note, that in such descents which take away entries, it behoveth that a man die seised in his demesne as of fee, or in his

demesne as of fee tail. For a dying seised for term of life, or for term of another man's life, doth never take away an entry.

§ 388. Also, a descent of a reversion, or of a remainder, doth not take away an entry. So as in those cases which take away entries by force of descents, it behoveth that he dieth seised of fee and freehold at the time of his decease, or of fee tail and freehold at the time of his death, or otherwise such descent doth not take away an entry.

The rule appeareth by these two sections, that in such cases which take away entry by force of descent, it is necessary, that he who dieth seised have fee simple, and the freehold in possession at the time of his death; for no lesser estate of lands and tenements can descend unto the heir: for although it be said, *sect. 739*, if a man let lands to another, to have and to hold to him and to his heirs for term of another man's life, and the lessee dieth living *celui a que vie*, his heirs shall have the tenements, living he, for whose life; yet this is but an estate of freehold, descendable at the common law, and no estate of inheritance, by the descent of which the entry of the disseisor may be taken away. But *nota 8 Co. 101*, a special case of bastards *eignè* and *mulier puisnè*; in which case the descent doth not bind the entry only, but the right also; and therefore a descent in that case is a bar to the right, when it doth not take away entry in case of disseisin, as a descent of service, rent, reversion expecting upon an estate tail, doth bar the right of the *mulier*, as it doth appear in *44 E. 2. tit. Bastardy, 26.* but such a descent doth not take away the entry of the disseisee. For the better understanding of all things in this chapter contained, *vide Finch, lib. 2. cap. 10. fo. 49.*

§ 389. Also, as it is said of descents which descend to the issue of them which die seised, &c. the same law is where they have no issue, but the lands descend to the brother, sister, uncle, or other cousin of him which dieth seised.

§ 390. Also, if there be lord and tenant, and the tenant be disseised, and the disseisor alien to another in fee, and the alienee die without issue, and the lord enter as in his escheat: in this case the



disseisee may enter upon the lord, because the lord cometh not to the land by descent, but by way of escheat.

Item, as it is aforesaid of descents, which descend to the issue of them which died seised, who are heirs lineal, the same law is when they have no issue, but the tenements do descend to the brothers, sisters, uncles, or cousins, who are collateral heirs. But we see it is necessary in all cases that lands do descend to an heir; for if it do escheat, as where the alienee of the disseisor dieth without heir, the disseisee may enter; because the lord doth not come to the land by descent, but by way of escheat, for want of an heir lineal or collateral. 9 H. 7. 24*b*. 37 H. 6. 1.

§ 391. Also, if a man be seised of certain land in fee, or in fee tail, upon condition to render certain rent, or upon other condition; albeit such tenant seised in fee, or in fee tail, dieth seised, yet if the condition be broken in their lives, or after their decease, this shall not take away the entry of the feoffor or donor, or of their heirs, for that the tenancy is charged with the condition, and the state of the tenant is conditional, in whose hands soever that the tenancy cometh, &c.

§ 392. Also, if such tenant upon condition be disseised, and the disseisor die thereof seised, and the land descend to the heir of the disseisor, now the entry of the tenant upon condition, who was disseised, is taken away. Yet if the condition be broken, the feoffor or the donor which made the estate upon condition, or their heirs, may enter *causâ quâ suprà*.

And now Littleton doth shew some limitation of the general rules before mentioned; for the force of a condition is such, that lands tied therewith, do remain subject to the condition, and defeasible, in whose hands soever they do come, any descent notwithstanding; and if the disseisor of the feoffee upon condition, 21 H. 6. 17*b*. 33 Ass. pl. 11, or the alienee in mortmain, 47 E. 3. fo. 11, die seised, or if a man devise that J. S. shall sell his lands in London,

*Bro. Devises*, 36, and the heir is disseised, or doth make a feoffment, and the disseisor or feoffee die seised, the feoffor upon condition in the first case, the lord in the second cases, and in the last, may enter notwithstanding a descent: for they have no other remedy. *Finch*, 49 b.

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§ 393. Also, if a disseisor die seised, &c. and his heir enter, &c. who endoweth the wife of the disseisor of the third part of the land, &c. in this case as to this part which is assigned to the wife in dower, presently after the wife entereth, and hath the possession of the same third part, the disseisee may lawfully enter upon the possession of the wife into the same third part. And the reason is, for that when the wife hath her dower, she shall be adjudged in immediately by her husband, and not by the heir; and so, as to the freehold of the same third part, the descent is defeated. And so you may see, that before the endowment the disseisee could not enter into any part, &c. and after the endowment he may enter upon the wife, &c. but yet he cannot enter upon the other two parts, which the heir of the disseisor hath by the descent.

This case is also a limitation of the former, in respect of the third part which the heir doth assign to the wife of the disseisor for her dower, by a matter *ex post facto*; for when the woman doth enter after the death of her husband, into the third part of her husband's lands by the heir assigned unto her, she shall be adjudged by the law to be in immediately by her husband; for in his life-time her title to have did begin, and not by the heir, and so, as unto the freehold of the third part, the descent, by which the entry of the disseisee shall be taken away, is defeated; for as to her third part, the disseisee may enter lawfully. And for the same cause it is, if a man seised of lands in fee, have issue a son and a daughter by one venter, and a son by another venter, and dieth, the eldest son entereth, and doth endow the widow of his father, the eldest son dieth without issue, the tenant in dower dieth, the youngest son of the half blood shall inherit that part whereof the woman was endowed, as heir unto his father, and not the sister or other the next collateral heir to the eldest brother, as he shall do of the other two parts: 7 H. 5. fo. 2, well argued: 38 Ass. pl. 26, according. *Bro. Descents*, 19. *Vide*

*Kitchin*, 100: for the estate of tenant in dower is *quodammodo* a continuance of her husband's estate, and tenant in dower is in [in] the *per* by her husband, and in of his estate; *quod nota bene* 7 *Co.* 9 a, *the Countess of Bedford's case*. And therefore dower may not be assigned, reserving rent, or with a remainder over; for she is in by her husband, and not by him that doth assign the dower. *Vide Plowd.* 25 b. *Finch*, 5 a. And it is to be observed by the premises, that dower doth take away that estate which by the law doth descend (*ut hic*); but dower doth not take away that estate which [was] acquired, and gained by purchase. 4 *Co.* 122. Note the case and the diversity.

Note, that bastard *eignè* die seised, and his issue do endow the wife of the bastard, the *mulier* shall not enter upon the tenant in dower; for the right of the *mulier* was barred by the dying seised, and the descent; otherwise it is of a *déscent* which doth take away entry only, and not the right. The same law is, if the wife of the father of the bastard *eignè* and *mulier puisnè*, be endowed, yet the issue of the bastard shall have the reversion of it. 8 *Co.* 101 b.

A man seised of lands in fee, hath issue a son and a daughter by one venter, and a son by another venter, and dieth; if the eldest son do make a lease for life, against whom the wife of his father doth recover dower, and after the eldest son dieth, the sister shall have the reversion in fee, because the eldest son hath altered the reversion by his lease for life, and the tenant in dower doth leave the reversion in the tenant for life. 8 *Co.* 35 b.

§ 394. Also, if a woman be seised of land in fee, whereof I have right and title to enter, if the woman take husband, and have issue between them, and after the wife die seised, and after the husband die, and the issue enter, &c. in this case I may enter upon the possession of the issue, for that the issue comes not to the lands immediately by descent after the death of the mother, &c. but by the death of the father.

*Contrarium tenetur* P. 9 H. 7. *per tout le court*, and M. 37 H. 6.

It is so in 37 H. 6. *per cur.* 9 H. 7. 24 b, it was so affirmed by all the court, which is contrary to Littleton in this case; but *Bro. Entry Congeable*, 92, saith, *quod mirum*; for the descent in that

case was but of a reversion, which doth not take away the entry of the disseisee accordant to Littleton; therefore in this case *quære legem*; and in [3 Co.] 34 *a*, this case is recited and not denied; whereby it seemeth the case, as it is set down in Littleton, is approved: and in the case of Coke, note much good matter concerning this word "immediate."

§ 395. Also, if a disseisor enfeoff his father in fee, and the father die seised of such estate, by which the land descend to the disseisor, as son and heir, &c. in this case the disseisee may well enter upon the disseisor, notwithstanding the descent; for that as to the disseisin, the disseisor shall be adjudged in but as a disseisor, notwithstanding the descent, *quia particeps criminis*.

This also is another limitation, and so also is the subsequent section; and by Horton, Justice, in 13 *H.* 4. *fo.* 8, if a man disseise me, and enfeoff his grandfather in fee, after whose death the lands do descend to his father, I shall not enter upon him because of the descent; but if the father die seised, so that the land descend to the son, who was the disseisor, my entry is lawful upon him, because he did the wrong; by *Hill* according, 11 *H.* 4. 83 *b.* *Perk.* 77 *a.* 5 *H.* 7. 6 *b.*, by *Keble*. 12 *H.* 8. 10. 24 *H.* 8. 3. 8 *E.* 4. 19. 33 *H.* 6. 5. 18 *E.* 3. 25. 34 *H.* 6. 10 *b.*, *et seq.* And by *Keble*, in *Keilw.* 127 *a.*, if the disseisor enfeoff his father, and the father dieth seised, and the land descendeth upon the disseisor, yet the disseisee may have an assise if he will not enter, and such descent shall not put him from his action, or a writ of entry against his will. It is also a rule in the law, that no man shall take advantage of his own wrong. 4 *Co.* 82 *a.*, *Corbet's case*. And for the same cause it is, that an executor of his own wrong may not pay himself by retainer: 5 *Co.* 30 *b.*: and to this purpose see other cases in 5 *Co.* 75 *a.*

§ 396. Also, if a man seised of certain land in fee, have issue two sons, and die seised, and the younger son enter by abatement into the land, and hath issue, and dieth seised thereof, and the land descend to his issue, and the issue enters into the land: in this case

the eldest son, or his heir, may enter by the law upon the issue of the younger son, notwithstanding the descent, because that when the younger son abated into the land after the death of his father, before any entry made by the eldest son, the law intends that he entered claiming as heir to his father. And for that the eldest son claims by the same title, that is to say, as heir to his father, he and his heirs may enter upon the issue of the younger son, notwithstanding the descent, &c. because they claim by the same title. And in the same manner it shall be, if there were more descents from one issue to another issue of the younger son.

They that descend from one same parentage, who are next joined by nature, are next joined in love, and the makers of our law knowing it to be so, in respect thereof have established divers maxims: and therefore if the father died seised of lands, and the younger son enter, the eldest son shall not have an assise of *mort* [d'ancestor] nor a writ of right against him. But if there were sisters or brothers in gavelkind, the *nuper obiit* lieth between them, in case where the ancestor died seised (1); for the law doth intend, that he who is so near in blood, is also as near unto him in love, and therefore may not presume that his entry is as the entry of an enemy, but as the entry of his friend, done to preserve the inheritance in his absence: and ensuing this, which nature doth persuade, the common law hath not framed any action against him; and therefore also no descent of the younger brother, or of any of his issues, will bind the entry of the elder brother; for, common law will not believe, that any of them do claim any freehold or inheritance, but do rather hold it as bailiffs and friends to the elder, for which cause no descent will take away the entry. And such presumption is the cause that a collateral warranty made by the brother, or other of his blood, more further off, is a bar unto him upon whom it doth descend without assets, and the law herein was made upon sufficient reasonable consideration; for they that make laws, do not make them for things against nature, which are monstrous, and happen rarely, but

(1) Two coparceners agree to present by turns, the one of them does present three or four times together, this is no

usurpation to put the other out of possession. 9 Eliz. 239, pl. 20. Com. 58.—  
Note in MS.

for things which do stand with nature, and do often happen (1); and therefore the law doth presume, that he is as much advanced as hindered by the warranty. Also brothers and cousins shall not wage battle in a writ of right between them, with liberty of battle; and see more *Plowd.* 306 a. *Finch*, 7 b. 1 *Ass. pl.* 13. 29 *Ass. pl.* 54, where the law was taken in this point, as it appeareth accordingly in Manxell's case, in the *Com. fo.* 6 a, b, divers cases in our laws grounded upon presumption which are according unto reason, and [to which they] do give credit in such cases as unto the gospel.

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§ 397. But in this case, if the father were seised of certain lands in fee, and hath issue two sons, and die, and the eldest son enter, and is seised, &c. and after the younger brother disseiseth him, by which disseisin he is seised in fee, and hath issue, and of this estate dieth seised, then the elder brother cannot enter, but is put to his writ of *entrie sur disseisin*, &c. to recover the land. And the cause is, for that the youngest brother cometh to the lands by wrongful disseisin done to his elder brother; and for this wrong the law cannot intend that he claimeth as heir to his father, no more than if a stranger had disseised the elder brother which had no title, &c. And so you may see the diversity, where the younger brother entereth after the death of the father before any entry made by the elder brother in this case, and where the elder brother enters after the death of his father, and after is disseised by the younger brother, where the younger after dieth seised.

*Stabitur presumptioni donec probetur in contrarium.* 5 *Co. pt.* 1. 7 b. 4 *Co.* 71 b. *Acta exteriora indicant interiora secreta.* 8 *Co.* 146 b. *Nota bene, Dyer*, 5 a. *Attaint.*

§ 398. In the same manner it is, if a man seised of certain land in fee, hath issue two daughters and dieth, the eldest daughter en-

(1) *Lycurgus legem parricidis noluit instituere, propterea quod nullus adeo impios existimavit.*—*Note in MS.*

tereth into the land claiming all to her, and thereof only taketh the profits, and hath issue and dieth seised, by which her issue enter, which issue hath issue and dieth seised, and the second issue enter, *et sic ultra*, yet the younger daughter, or her issue as to the moiety, may enter upon any issue whatsoever of the elder daughter notwithstanding such descent, for that they claim by one same title, &c. But in such case where both sisters have entered after the death of their father, and were thereof seised, and after the eldest sister had disseised the younger of her part, and was thereof seised in fee, and hath issue, and of such estate dieth seised, whereby the lands descend to the issue of the elder sister, then the younger sister nor her heirs cannot enter, &c. *causâ quâ suprà*, &c.

*Vide sect. 384.* The author saith, *ex paucis dictis intendere plurima potes*; and in another place he saith, when the reason is one in several, *eadem est lex*, and therefore it seemeth this section, agreeing with the reason of the precedent section, might be omitted; nevertheless for as much as his book was only made for the instruction of his son, and other young students, therefore this was also added for explanation. And yet observe in both these cases, if the brother or sister, that was so in possession immediately after the death of their ancestors, had levied a fine with proclamations of all that land, according to the statute of 4 H. 7. cap. 24, such a fine had been a sufficient bar in law to the elder brother in the one case, and to the younger sister in the other of her moiety, the proximity of blood notwithstanding; for this is by a statute law, and is grounded upon another reason, *expedit reipublicæ ut sit finis litium*.

§ 399. Also, if a man be seised of certain lands in fee, and hath issue two sons, and the elder is a bastard and the younger *mulier*, and the father dieth, and the bastard entereth claiming as heir to his father, and occupieth the land all his life, without any entry made upon him by the *mulier*, and the bastard hath issue, and dieth seised of such estate in fee, and the land descend to his issue, and his issue entereth, &c. in this case the *mulier* is without remedy, for he may not enter, nor have any action to recover the land, because there is an ancient law in this case used, &c.

Note in the beginning of this section, the words are, that if a man be seised of certain lands in fee, and hath issue two sons, and the eldest son is a bastard, and the younger brother is *mulier*, this word "fee" in this case must be intended fee simple, as we are taught before in *sect.* 293, and doth exclude fee tail; for the right of the *mulier puisnè*, and of his heirs, are not bound by such a descent in tail (1), as it is observed. *Plowd.* 57 a. 39 E. 3. *pl. ult.* Note, that it doth appear in this section expressly, that in this case the *mulier* shall be barred, because of the continuance of the bastard's possession, and his dying seised *a la place*, and the descent to his issue. And in 8 Co. 101 b, if the bastard born before espousals doth enter, and have issue, and dieth seised, this shall bar the collateral heir, and the lord by escheat, as well as the heir *mulier*; but if the bastard have not any issue to whom it may descend, neither the *mulier*, nor the lord by escheat, nor the collateral heir of the *mulier*, are not bound by the bastard's continuing of possession, nor dying seised in place.

§ 400. But it hath been the opinion of some, that this shall be intended where the father hath a son bastard by a woman, and after marrieth the same woman, and after the espousals he hath issue by the same woman, a son or a daughter, and after the father dieth, &c. if such bastard entereth, &c. and hath issue and die seised, &c. then shall the issue of such bastard have the land clearly to him, as it is said before, &c. and not any other bastard of the mother which was never married to his father; and this seemeth to be a good and reasonable opinion: for such a bastard born before marriage celebrated between his father and his mother, by the law of holy church, is *mulier*, albeit by the law of the land he is a bastard, and so he hath a colour to enter as heir to his father, for that he is by one law *mulier*, (*scil.*) by law of holy church. But otherwise it is of a bastard, which hath no manner of colour to enter as heir, in so much as he can by no law be said to be *mulier*, for such a bastard is said in the law to be *quasi nullius filius*, &c.

In this section Littleton doth distinguish of bastards, and in the civil law there are divers sorts of them, namely, *fili naturales*, *nothi*,



*manzeres, spurii, incestuosi*, whereof you may read in *Dr. Ridley's View of Civil and Ecclesiastical Law*, fo. 199, 200. The bastard mentioned and intended is, *filius naturalis*, and that the law of the church, or common law, is so as in this place is alleged, it doth appear by the statute of Merton, which was made in the 20th year of H. 3. cap. 19, *rogaverunt omnes episcopi ut consentirent, quòd nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium quantum ad successionem hæreditariam, quia ecclesia tales habet pro legitimis: et omnes comites et barones unâ voce responderunt, nolumus leges Angliæ mutare quæ hucusque usitata et probata sunt. Vide 4 Co. Pref. fo. 2 a. Bracton, li. 2. fo. 63. Matrimonium subsequens legitimos facit quoad sacerdotium*, because they are legitimate by the canon law, *non quoad successionem, propter consuetudinem regium, quòd se habet in contrarium. 8 Co. 101 a, b. Co. 65 a, nota.* And by the way, this may be observed for an infallible argument, that those canons and ordinances of the church of Rome [did not derive their force from any authority which the court of Rome] had, to impose laws over all nations without state consent or allowance; for by the same reason they might reject one canon, they might also reject all. See *Sir John Davies' Book*, fo. 70 b, et seq. 5 Co. fo. 9 a, *de jure regis ecclesiastico*. Nevertheless because the pope's canon laws were in part received throughout Christendom, therefore Littleton doth give this canon the title of the law of the holy church; and yet he, as it seemed, did not remember that canon, when he [said] that William the Conqueror was called a bastard, because he was born before marriage had between his father and his mother, and that after he was born they were married; 18 E. 4. 30 a; which indeed, if it had been by the imperial and general law of France, would have made him wholly legitimate. See *Selden's Review of his History of Tithes*. And it is observable, that though the canon of the church be not received with us, nor approved by the state allowance; yet doubtless that canon was the original occasion, and colour of the law of lapse from the council of Lateran under Alexander the Third, where the canon was made for the presentation within six months, and title of lapse given to the bishop in case the chapter were patron, and from the bishop to them, if he were patron; which although it be not law with us in that case, nor also the difference between a lay and ecclesiastical patron, for number of months, allowing the lay-man but four months, it sheweth itself certainly to be the original of the custom anciently and now used in the ordinary's collation. In such

sort some other canons have been received into our law, as of bigamy in the council of Lyons, interpreted by the parliament under Edw. 1. and of pluralities in the council of Lateran, held by Innocent the Third, reigning our King John. See [Drayton's] *Poliolbion*, fo. 130, and the *History of Tithes*, cap. 12, fo. 387, et seq. this general council vouched to this purpose. 4 Co. 79 a, et 55 b, et in Sir John Davies, 69 a. This same section doth shew, which also doth appear in other books of our law, that a man may be a bastard in the temporal law, and *mulier* in the civil law, and *è converso*, a man engendered in adultery during the coverture, is *mulier* by the temporal law, and bastard by the civil law. 7 Co. 44 a.

If a woman elope from her husband, and have issue in adultery, the issue is *mulier* by our law; but by the spiritual law her issue is a bastard. 18 E. 4. fo. 30 a. 7 II. 4. 9. 11 H. 4. 14. Note the reason, wherefore a younger son, who is born during the espousals of a lawful wife, is called *mulier*, seu *filius mulieratus* because this word *mulier* in Latin hath three significations; 1°. *Sub nomine mulieris continetur quælibet fœmina*: 2°. *Propriè continetur mulier quæ virgo non est*. 3°. *Appellatione mulieris in legibus Angliæ continetur uxor*; so that *filius natus ex justâ uxore appellatur in legibus Angliæ, filius mulieratus*; sicut *bastardus dicitur a Græco vocabulo, bassaris, id est, meretrix seu concubina, quia procreatur ex meretrice vel concubina*. 8 Co. 102 b.

§ 401. But in the case aforesaid, where the bastard enter after the death of the father, and the *mulier* oust him, and after the bastard disseise the *mulier*, and hath issue and dieth seised, and the issue enter, then the *mulier* may have a writ of *entrie sur disseisin* against the issue of the bastard, and shall recover the land, &c. And so you may see a diversity where such bastard continues the possession all his life without interruption, and where the *mulier* entereth and interrupts the possession of such bastard, &c.

This case is a parallel to the *sect.* 397, and needs no other exposition.

§ 402. Also, if an infant within age hath such cause to enter into any lands or tenements upon another, which is seised in fee, or in

fee tail of the same lands or tenements, if such man who is so seised, dieth of such estate seised, and the lands descend to his issue during the time that the infant is within age, such descent shall not take away the entry of the infant, but that he may enter upon the issue which is in by descent, for that no laches shall be adjudged in an infant within age in such a case.

This case is also another limitation of the rule put, and therefore it is said in *Dr. & Stud. li. 1. cap. 17. fol. 29 a*, there be in many cases exceptions from the general grounds of the law, as it is of this general ground, that it is not lawful for any man to enter upon a descent; yet the law excepteth from that ground an infant that hath right, and hath suffered such a descent. Where also you may read divers other cases of the same nature, and it is not impertinent to declare at large wherein infants are protected by the law and where not. By the statute *modo levandi fines*, 18 E. 1, it appeareth, that a fine levied in the common place is such and of so great force, and of so puissant nature in itself, that it doth foreclose not only those that be parties and privies to the fine, and their heirs, but all other people of the world which be of full age; and so it appeareth also by the statute *de donis conditionalibus*, made in 13 E. 1, that judgment final in a writ of right in the common place, shall bind all strangers, if they do not put in their claim within the year and day after the judgment and execution; and yet the common law doth except infants; for an infant hath not intelligence, nor cannot know his right, nor how to pursue it, by entry, or action. And note, at the common law an infant who was not bound to make claim within the year and day, was perpetually excepted, and for them and their heirs to make claim.

Also, in the general statute made in the 4 H. 7. c. 24, touching fines, infants are excepted amongst others. The statute of Westm. 2. cap. 25, is, that if one named a disseisor in an assise do vouch a record, and doth fail at the day, he shall be imprisoned by a year; yet if an infant disseisor vouch a record, and fail, he shall not be imprisoned, as it is adjudged in our book, *Dr. & Sud. fo. 147*, by the statute *conjunctim feoffatis*, 34 E. 1. fo. 66 a. But if a tenant in assise be an infant, who do plead joint-tenancy, yet if the plea be found against him, he shall not be imprisoned, though the said statute be general, and doth not except an infant, *Dr. & Stud.*

147 b. according. Vide Fardinando Poulton, contrary, fo. 15. So if an infant be a bailiff or receiver, and accounts before auditors assigned, and is found in arrearages, the auditors cannot commit him to the next gaol; and yet the statute of Westm. 2. cap. 11, is general, that they may commit all bailiffs and receivers; but infants, who have not discretion by the reasonable sense of the letter, are not meant or bound by that statute. Also, if an infant be convicted of the ravishment of the ward of another man, he shall not be imprisoned for the fine of the king, and yet the statute of Merton, cap. 6, is general, *quicumque laicus qui inde convictus fuerit* shall be imprisoned. Also, if a woman consent to a ravisher, the next of blood to her shall have a title of entry by the statute of 6 R. 2. cap. 6; yet if a woman that is an infant be ravished, and she consent to the ravisher before the age of twelve years, the heir or next of blood, to whom the land should come, shall not enter, and yet she is within the letter of the statute; which is, *si dominæ filia et aliæ mulieres consenserint*; yet she under the age is under the age of consent, because she at that age is without discretion, and so is within the purview of the words by act general; and yet she is without the purview by a reasonable sense added unto it. But [(1) an infant shall be bound by the statute of *cessavit* and of waste, although] those statutes be general, for cesser is an injury to the lord, and waste is injurious to the lessor, and he himself did acquire the estate; and therefore an infant shall be chargeable for waste committed by a stranger. *Dr. & Stud. fo. 29, et 147 b.* If an infant lord, who hath title to enter into mortmain, doth not enter within the year; 8 Co. 44 b; or if an infant lord doth not enter into the lands of his villein, before that the villein hath aliened them, he shall be bound by laches; for in that case he hath but a title to a thing, which never was in him: and in divers cases at the common law laches of infants and other acts shall bind them, as for waives, stray, goods taken from them and offered to images, or wrecked, or taken by enemies, and not reprised before the setting of the sun, or sold in market overt, or acts done by them by reason of their office, as a gift of goods by an infant executor, and acts done by the king, being an infant, are for necessity, as an obligation for *maunger et boyer*: Com. 364 b: where a principal case was; a dis-

(1) Almost all of this matter on the liability of infants, is taken from Plowden, whence these words are supplied: the reference at the bottom of the next page

to Plowd. 364, is so far off, that the reader might be troubled to discover where this addition was taken from.—Ed.

seisor did levy a fine with proclamations, the disseisee after three years, and before five years, dieth, his heir being within age, who after the five years expired doth become of lawful age, and doth enter; and it was adjudged, that his entry was not lawful. If an infant doth acknowledge a statute, it shall not be avoided, but only during his non-age by *audita querela*, as fine shall by writ of error; for it shall be tried by inspection of the court, whether he be within age or not. *Finch*, 51 a. 10 Co. 43 a. *The Register*, 150 b. *Dyer*, 232 b. *Vide Fard. Poulton*, 96 b, *contrary*. Regularly if the estate of an infant be upon condition to be performed by the infant, whether it be by condition in *fact*, or condition in law, if the condition be broken during his minority, the land is lost for ever; but if the condition in law be by force of a statute law, which doth give entry and no action, as if an infant do alien in mortmain, there, although the lord of whom the land is holden do enter, yet the right of the infant is not barred; for if infant lessee for life do make a feoffment in fee, the lessor may enter for the forfeiture, because of the condition in law, but the infant is not thereby barred. [10 Co.] 44 b.

§ 403. Also, if husband and wife, as in right of the wife, have title and right to enter into lands which another hath in fee, or in fee tail, and such tenant dieth seised, &c. in such case the entry of the husband is taken away upon the heir which is in by descent. But if the husband die, then the wife may well enter upon the issue which is in by descent, for that no laches of the husband shall turn the wife or her heirs to any prejudice nor loss in such case, but that the wife and her heirs may well enter, where such descent is eschewed during the coverture.

§ 404. But the court holdeth, where such title is given to a *feme sole*, who after taketh husband which doth not enter, but suffer a descent, &c. there otherwise it is, for it shall be said the folly of the wife to take such a husband, which entered not in time, &c.

According to these two sections do agree 9 H. 7. 24a. *Brooke's Entry Congeable*, 92. *Dyer*, 145. *et vide Perk.* 17a. *Vide sect.* 437. *et* 440, in Littleton, other cases framed upon the like reasons, that these cases are: read the sections, for I do here purposely omit them for brevity's sake; *et nota* 8 Co. 100 b.

§ 405. Also, if a man which is of non-sane memory, that is to say, in Latin *qui non est compos mentis*, hath cause to enter into any such tenements, if such descent, *ut suprà*, be had in his life during the time that he was not of sound memory, and after dieth, his heir may well enter upon him which is in by descent. And in this case you may see a case, where the heir may enter, and yet his ancestor which had the same title could not enter. For he which was out of his memory at the time of such descent, if he will enter after such a descent, if an action upon this be sued against him, he hath nothing to plead for himself, or to help him, but to say, that he was not of sane memory at the time of such descent, &c. And he shall not be received to say this, for that no man of full age shall be received in any plea by the law to disable his own person, but the heir may well disable the person of his ancestor for his own advantage in such case, for that no laches may be adjudged by the law in him which hath no discretion in such case.

It is to be observed, there be four manners of *non compos mentis* (1); 1st. Idiot, or fool natural; 2dly. that was of good memory, and by the visitation of God hath lost it; [3dly.] *lunaticus qui gaudet lucidis intervallis*; and sometimes is of good memory, and sometimes *non compos mentis*; [4thly.] By his own act and default as a drunkard. 4 Co. 125b. This is a special case, wherein the heir may have special benefit and advantage, as an heir, where his father or other ancestor, to whom he is heir, could not by the law have the same benefit or advantage; for regularly the law is otherwise, whereof see sect. 734. and see a special case also in 3 Co. 12a. in debt against the heir upon an obligation made by the ancestor, the plaintiff by the common law shall have all the lands, which descend unto the heir in execution against him, and yet he could not have execution of any part of the land against the father himself.

The reason alleged for and in this present section is, because it is a maxim in law that no man of full age shall be received in any plea to be pleaded by himself to stultify and disable himself, and according is 5 E. 3. 70. *et* 35 Ass. pl. 10; but Fitz. N. B. 202 D, is

strongly of another opinion, and that a man, who is of non-sane memory, may as well shew his unfeigned infirmity, which happened unto him by the visitation of God, as he may shew his nonage, but this opinion of Fitzherbert is not law. But Littleton in this place doth say, that the heir may disable the person of his ancestor for his own advantage in this case, and with this doth agree, 4 Co. 124a: and as the heir may shew the disability of him who was *non compos mentis*, and avoid the deeds, grants, and feoffments, because he was privy in blood, so may his executors or administrators shew the insanity of their testator, or intestate, in other cases; for they are privies in representation: and as Littleton saith, sect. 337, they represent the person of the testator, or intestate: yet this general rule hath some exceptions; for if an infant be executor to a man of full age, a release made by the infant executor of any goods or other things which belonged to him, as executor, do not bind him in the law, without full satisfaction, and a release in such case, if it had been made by the testator, whose person the executor is said to represent, the release had been good without satisfaction. 5 Co. 27a, b.

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§ 406. And if such a man of non-sane memory make a feoffment, &c. he himself cannot enter, nor have a writ called *Dum non fuit compos mentis*, &c. *causâ quâ suprâ*: but after his death his heir may well enter, or have the said writ of *Dum non fuit compos mentis* at his choice. The same law is where an infant within age maketh a feoffment, and dieth, his heir may enter, or have a writ of *Dum fuit infra ætatem*, &c.

This case is agreed to be law in the precedent section, being put of a feoffment made by a man who is not *compos mentis*; but in 4 Co. 125, a diversity is taken, between a bar of his right, and this case, which is a bar of his entry, and action; for in case of a bar of his right, his laches shall not prejudice him; but in such a special case he may plead and shew, that he was *non compos mentis*; as if a man of *non compos mentis* be disseised, and the disseisor doth levy a fine, in this case, at the common law, he that was *non compos mentis* shall not be bound, although the year and day had passed; but that he may enter, and this is to be proved by the statute *de modo levandi fines*, which was made 18 E. 1.: and so is the law at

this day upon the statute 4 H. 7. cap. 14. respectively: but laches shall be a bar of his entry; for if he be disseised, and the disseisor die seised, this descent shall take away his entry; but after his death his heir may enter, and take advantage of the infirmity of his ancestor. Littleton doth conclude this, No laches may be judged by the law in him who hath no discretion in such a case, that is, having regard to his heir, and so note the diversity.

It is also here concluded, that the same law is, where an infant within age doth make a feoffment, and dieth, his heir may enter, and have a writ *dum fuit infra ætatem*; the reason hereof is one in both cases, because the heir is no stranger to the infant, or to him that was *non compos mentis*: and as unto this matter it is, to wit, that there be three manners of privities, (*scil.*) privy in blood, as the heir, who also must be such an heir that is inheritable: 2d. privy in estate, joint-tenants: *vide sect. 634*. 3d. privy in law, when the law without blood or privy of estate, doth cast the land upon one, or doth make his entry lawful, as the lords by escheat, &c. But privies in estate shall not take advantage of the infancy of another, except in special cases; and privies in law shall never take benefit of the privy of the infancy, because he is a stranger to him; therefore when the infant is dead without heir, the feoffment is unavoidable. 8 Co. 43, *Whittingham's case*.

§ 407. Also, if I be disseised by an infant within age, who alieneth to another in fee, and the alienee dieth seised, and the lands descend to his heir, being an infant within age, my entry is taken away, &c.

§ 408. But if the infant within age enter upon the heir which is in by descent, as he well may, for that the same descent was during his nonage, then I may well enter upon the disseisor, because by his entry he hath defeated and taken away the descent.

§ 409. In the same manner it is, where I am disseised, and the disseisor make a feoffment in fee upon condition, and the feoffee die of such estate seised, I may not enter upon the heir of the feoffee: but if the condition be broken, so as for this cause the feoffor enter upon the heir, now I may well enter, for that when the feoffor or his heirs enter for the condition broken, the descent is utterly defeated, &c.



And according to the reason hereof is 8 Co. 44*a*, for *quando aliquid impeditur propter unum, eo remoto, tollitur impedimentum*, as it is said, 5 Co. 77*a*. in *Paget's case*; *et, eodem modo quo quid constituitur, dissolvitur*; 4 Co. 118*b*.

§ 410. Also, if I be disseised, and the disseisor hath issue and entereth into religion, by force whereof the lands descend to his issue, in this case I may well enter upon the issue, and yet there was a descent. But for that such descent cometh to the issue by the act of the father, *scil.* for that he entered into religion, &c. and the descent came not unto him by the act of God, *scil.* by death, &c. my entry is congeable. For if I arraign in assise of *novel disseisin* against my disseisor, albeit he after enter into religion, this shall not abate my writ, but my writ, notwithstanding this, shall stand in his force, and my recovery against him shall be good. And by the same reason the descent which cometh to his issue by his own act, shall not take from me my entry, &c.

And see sect. 200. that which is said touching this civil death.

§ 411. Also, if I let unto a man certain lands for the term of twenty years, and another disseiseth me, and oust the termor, and die seised, and the lands descend to his heir, I may not enter; and yet the lessee for years may well enter, because that by his entry he doth not oust the heir who is in by descent of the freehold which is descended unto him, but only claimeth to have the lands for term of years, which is no expulsion from the freehold of the heir who is in by descent. But otherwise it is, where my tenant for term of life is disseised, *causa patet*, &c.

But if the lessee for years be put out, and he in the reversion be disseised, and the disseisor doth levy a fine with proclamations, according to the statute 4 H. 7. cap. 24. and five years pass, as well

the lessor as the lessee are bound by their non-claim. 5 Co. 124, *Saffin's case*; and 9 Co. 101, *Margaret Podger's case*; and the case in this section that lessee for years may enter a descent notwithstanding. 7 H. 7. 13a.

§ 412. Also, it is said, that if a man be seised of lands in fee by occupation in time of war, and thereof dieth seised in the time of war, and the tenements descend to his heir, such descent shall not oust any man of his entry; and of this a man may see in a plea upon a writ of aiel, 7 E. 2.

It is well said in 10 Co. *fq.* 82. *et* 127, *judicis officium est, ut res, ita rerum tempora quærere, quæsito tempore tutus eris*; for if imprisonment be a sufficient excuse to avoid a descent, as it is declared *sect.* 436. much more in this case, if a man be disseised of his lands in time of war, the disseisee in this case may enter, and no negligence in such case shall be imputed unto the disseisee; for the law doth presume, and also direct all men in time of hostility and war to employ their care and diligence in defence of the commonwealth, and about the vanquishing and expulsion of the common enemy: and it is holden, 6 E. 3. 41, that if a presentment to a church be by an usurper in the time of war, and the institution and induction are in time of peace, yet all shall be void (1), which is vouched in 1 Co. 99b. and in the 2d *part* 93: and in the time of war a man may justify the making of bulwarks in another man's lands, without any licence of the owner, as it is agreed in *Dyer*, *fo.* 36b. 9 E. 4. 23a. 21 H. 7. 27b. 36 H. 8. *Dyer*, 60a. and therefore also 36a. if enemies do commit waste in the lands of a lessee for years, or for life, as in pulling down houses, or by fire consuming them, or by felling of timber trees thereupon growing, the lessee is punishable. If in the time of war the enemy open a common gaol, whereby the prisoners do escape, yet shall [the gaoler] be free from punishment; but otherwise it is if the prison be broken open by traitors and rebels: see the reason made in 4 Co. 84a. *et fo.* 82b. If tenants by *elegit* be interrupted to take the profits of the lands by reason

(1) See Co. Lit. 249 b.—Ed.

of wars, he shall not hold over; but this shall be in the disadvantage of the tenant by *elegit*, as it is adjudged 19 E. 1. *tit. Execution*, 146.

§ 413. Also, that no dying seised, where the tenements come to another by succession, shall take away the entry of any person, &c. As of prelates, abbots, priors, deans, or of the parson of a church, or of other bodies politic, &c. albeit there were twenty dyings seised, and twenty successors, this shall not put any man from his entry.

More shall be said of descents in the next chapter.

This last section may well be agreed; for it doth not agree with the cases and rules put in the beginning of the chapter; for descents which do take away entries must be in cases when the lands do descend from the disseisor to his heir, *ergo* not in cases of succession; for a corporation or body politic is invisible, infeasible, and immortal, nay, it hath no soul; for it is framed by the policy of man, and it is said in 7 Co. 10b. and in his 10th part, 32b, and therefore a body politic or a corporation cannot, as a body politic, neither make or take homage. 33 H. 8. *tit. Fealty. Brooke*, 5. But some men have double capacities, either to purchase lands to them and to their successors, or to them and to their heirs. *Plowd.* 234.

But *nota*, some corporations and their successors shall be barred, and bound by the Statute of Fines, made 4 H. 7. cap. 24, and non-claim; and the successors of some corporations are not bound by the statute, viz. mayors and commonalty, dean and chapter, colleges and such like are barred, and the statute doth extend to them; for they have absolute estates and authority; but the successors of bishops, dean sole seised, parson, vicar, or prebendary, and such like, are not within that statute; for such cannot depart with their possessions, without the consent of others, and have not absolute authority over their possessions. *Plowd.* 375b. *et* 538a. and in 11 Co. 69b. *et* 78b.

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LIB. III. CAP. VII.—*CONTINUAL CLAIM.*

§ 414. Continual claim is, where a man hath right and title to enter into any lands or tenements whereof another is seised in fee, or in fee tail, if he which hath title to enter makes continual claim to the lands or tenements before the dying seised of him which holdeth the tenements, then albeit that such tenant dieth thereof seised, and the lands or tenements descend to his heir, yet may he who hath made such continual claim, or his heir, enter into the lands or tenements so descended,\* by reason of the continual claim made, notwithstanding the descent. As in case that a man be disseised, and the disseisee makes continual claim to the tenements in the life of the disseisor, although that the disseisor dieth seised in fee, and the land descend to his heir, yet may the disseisee enter upon the possession of the heir, notwithstanding the descent.

By the last chapter may appear, as also by the recital of the statute 32 H. 8. cap. 33, the mischief which was at the common law, whereby men, that had right to lands and tenements, were put from their entry, if the disseisor had of such lands died seised; and in this chapter is shewed, how the said common law did provide a reasonable remedy in that case, although the disseisee did not enter according to his title, or peradventure durst not, for fear of battery, or death; that is to say, by making his claim in due form of law.

§ 415. In the same manner it is, if tenant for life alien in fee, he in the reversion or he in the remainder may enter upon the alienee. And if such alienee dieth seised of such estate without continual claim made to the tenements, before the dying seised of the alienee, and the lands, by reason of the dying seised of the alienee, descend to his heir, then cannot he in the reversion nor he in the remainder enter. But if he in the reversion or in the remainder, who hath cause to enter upon the alienee, make continual claim to the land before the dying seised of the alienee, then such a man may enter after the death of the alienee, as well as he might in his life-time.

And in 15 E. 4. 22 a, Littleton saith, that continual claim shall always be made by him who hath title to enter, and in whose life the dying seised was, and by no other, *quod Brian, concessit*; and in this case, he in the reversion, or in remainder, is the person to whom the immediate title is given, because when the tenant for life doth alien in fee, which was to the disherison of him in the reversion, or remainder, the estate, which the lessee for life had, was thereby forfeited. *Vide* 1 Co. 15, 16.

§ 416. Also, if land be let to a man for term of his life, the remainder to another for term of life, the remainder to the third in fee, if tenant for life alien to another in fee, and he in the remainder for life maketh continual claim to the land before the dying seised of the alienee, and after the alienee dieth seised, and after he in the remainder for life die before any entry made by him, in this case he in the remainder in fee may enter upon the heir of the alienee, by reason of the continual claim made by him which had the remainder for life; because that such right as he had of entry, shall go and remain to him in the remainder after him, insomuch as he in the remainder in fee could not enter upon the alienee in fee during the life of him in the remainder for life, and for that he could not then make continual claim. (For none can make continual claim, but when he hath title to enter, &c.) (1).

By the way is observable, if tenant for life be, the remainder for life to another, &c. and the first tenant doth commit a forfeiture of his estate, by alienation in fee or otherwise, that he in the remainder

(1) Littleton, in this section saith, &c. which doth imply something to be understood, and under the favor of this book he in remainder for life may not enter: so is 20 Ass. pl. 64. so there is a case in 45 Ass. pl. 7. a remainder to B. and his wife in special tail: the wife dieth, so that the husband is tenant in tail after

possibility, and then the tenant for life doth make a feoffment or any other forfeiture, the tenant in tail after possibility may not enter; for it is not to his disheritance, who had not inheritance in him. *Tenant pour 20 ans fait lease pour 10, le lessee fait feoffment, le premier lessee peut entrer*; adjudged.—Note in MS.

for life may presently enter, because of the forfeiture. But if a copyholder for life, where the remainder is over for life, doth commit a forfeiture, he in the remainder cannot enter until the death of the first tenant for life; for the estate of him in remainder for life is to commence in possession *post mortem*, but the lord, and he shall retain it during the life of him that did commit the forfeiture. 9 Co. 107a. See in *Dyer*, 16 et 17 *Eliz.* that the tenant for life in remainder may not enter for forfeiture. *Dyer*, 339, pl. 44. 43 Ass. 45.

Also, this may be observable, though it be not incident to this present section; if a man seised of lands in fee do thereof make a lease for life to J. at S. the remainder to J. at N. for life, in this case J. at S. is not to be punished for any waste to be committed by him, because of the mean remainder for life; but if J. at N. die, then he in the reversion may maintain his action of waste, against J. at S.; for it was to the disheritance of him in the remainder in fee, and now the impediment, which was the mean estate for life, is taken away, *et remoto impedimento emergit actio*. 5 Co. 76b. *Page's case*. But if lessee for life be, the remainder for years, and the tenant for life doth commit waste, he in the reversion or remainder may presently bring his action of waste, the mean interest for years notwithstanding. *Fitz. N. B.* 59 H. I. *ratio differentia patet*.

And note in this section, that the continual claim which he in the remainder did make, shall give advantage to him in the remainder in fee to enter; for so much as he in the remainder in fee could not enter upon the alienee in fee, during the life of him in the remainder for life; for *impotentia excusat legem*, and in many cases the act of one shall give advantage and benefit unto another. *Vide sect.* 307. 308.

But if lands be let to a man for term of his life, the remainder to another for term of years, the remainder to a third person in fee, if the tenant for term of life do alien to another in fee, and he in remainder for years doth make continual claim in due form, after which the alienee dieth seised, and the lease for years doth determine, this claim made by the termor shall not be beneficial to him in the reversion, but he is barred by the descent on the part of the feoffee; for the lessee for years by his entry or claim, doth not induce the freehold, but only a chattel, which is not sufficient in this case. *Vide sect.* 411.

§ 417. But it is to be seen of thee, my son, how and in what manner such continual claim shall be made : and to learn this well, three things are to be understood. The first thing is, if a man hath cause to enter into any lands or tenements in divers towns in one same county, if he enter into one parcel of the lands or tenements which are in one town, in the name of all the lands or tenements, into the which he hath right to enter, within all the towns of the same county ; by such entry he shall have as good a possession and seisin of all the lands and tenements whereof he hath title of entry, as if he had entered in deed into every parcel : and this seemeth great reason.

§ 418. For if a man will enfeof another without deed of certain lands or tenements, which he hath in many towns in one county, and he will deliver seisin to the feoffee of parcel of the tenements within one town in the name of all the lands or tenements which he hath in the same town, and in other towns, &c. all the said tenements, &c. pass by force of the said livery of seisin to him to whom such feoffment in such manner is made, and yet he to whom such livery of seisin was made, hath no right in all the lands or tenements in all the towns, but by reason of the livery of seisin made of parcel of the lands or tenements in one town : *à multo fortiori*, it seemeth good reason that when a man hath title to enter into the lands or tenements in divers towns in one same county, before entry by him made, that by the entry made by him into parcel of the lands in one town, in the name of all the lands and tenements to which he hath title to enter within the same county, this shall vest a seisin of all in him, and by such entry he hath possession and seisin in deed, as if he had entered into every parcel.

§ 419. The second thing to be understood is, that if a man hath title to enter into any lands or tenements, if he dares not enter into the same lands or tenements, nor into any parcel thereof, for doubt of beating, or for doubt of maiming, or for doubt of death, if he goeth and approach as near to the tenements as he dare for such doubt, and by word claim the lands to be his, presently by such claim he hath a possession and seisin in the lands, as well as if he

had entered in deed, although he never had possession or seisin of the same lands or tenements before the said claim.

And it is to be observed, in *Plowden's Com. fo. 93 a*, that every coming upon the land is not an entry; for it was said, that Littleton in his book doth hold the law to be, that continual claim ought to be made upon the land, if he dare come thither; and in this case, if he come upon the land and make [claim] and depart bye and bye, this shall not to his disadvantage be adjudged an entry to all purposes, but only for this particular cause, *scilicet*, to make his continual claim; for he may have an assise of the first disseisin, and recover damages from the first day to the day of assise: for his intent was to make claim, and not to take the profits, or to expel the tenant utterly, and to keep the possession: and so the intent of the coming upon the land is to be respected. *Vide in Longo, 5 E. 4. 60, in Babington's case.*

*Nota*, when continual claim or livery of seisin is to be made of or into divers several parts and parcels within one county, there if it be executed in one town or place, within the said shire, in the name of all, it is sufficient in law, and the cause and reason thereof is, to avoid infinite and unnecessary labour; *infinitum in jure reprobatum, et lex non cogit ad vana et inutilia peragenda*: also, it is a presumption in law, that no man is ignorant of such open acts or things done within the same shire, where he is commorant, for the law is, if a felon be attainted, and after one other in the same county doth receive him, and aid him, he shall be accessory, although he had not known him to be a felon; for in *Fitz. Abr. tit. Corona, 377*, it is thus.

*Nota*, when a man is indicted of receiving one who is outlawed in the same county, he shall lose life or member, *secus esset in alio comitatu*. *Vide Stauf. Pleas del Coron. li. 1. cap. 46. and li. 2. cap. 32. See Fard. Poulton, fo. 138 b. sec. 14. ibidem.* And the reason is, because every county is an entire body in the eye of the law, in respect of the special and distinct government thereof. *See sect. 61.*

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§ 420. And that the law is so, it is well proved by a plea of an assise in the book of assises, *anno 38 E. 3. p. 32.* the tenor whereof followeth in this manner. In the county of Dorset, before the jus-



tices, it was found by verdict of assise, that the plaintiff which had right by descent of inheritance to have the tenements put in plaint, at the decease of his ancestor was abiding in the town where the tenements were, and by parol claimed the tenements amongst his neighbours, but for fear of death he durst not approach the tenements, but bringeth his assize, and upon this matter found, it was awarded that he should recover, &c.

See sect. 412, where you may see, that in time of war, if enemies do take away a man's goods, the law doth require that he, for the recovery of his goods again, should be bold, valiant, and diligent. *Vide 7 E. 4. 14 a.* For in such cases, *licitum est vim vi expellere*; but in time of peace, the law doth allow of fear and doubt of maim or for doubt of manslaughter, *tributum est enim omni animali, ut se, vitam corpusque tueatur*; and therefore it giveth to the party remedy by continual claim to continue his right. *Vide 14 H. 4. 13 b.* Also livery and seisin may be made in divers cases within the view, whereof see in *Dyer*, 18 *b. et fo. 33 b.*

§ 421. The third thing is to know within what time and by what time the claim which is said continual claim shall serve and aid him that maketh the claim, and his heirs. And as to this it is to be understood, that he which hath title to enter, when he will make his claim, if he dare approach the land, then he ought to go to the land, or to parcel of it, and make his claim; and if he dare not approach the land for doubt or fear of beating, or maiming, or death, then ought he to go and approach as near as he dare towards the land, or parcel of it, to make his claim.

*Nota*, the cause and reason wherefore continual claim ought to be made upon the land, or in cases of fear and doubt, as is afore-said, so near the land as he dare go unto it, is, that thereby notice may be given to the country, *quod tota curia affirmabit.* 9 *H. 4. fo. 6 a.* See sect. 179.

§ 422. And if his adversary who occupieth the land, dieth seised in fee, or in fee tail, within the year and a day after such claim, whereby the lands descend to his son, as heir to him, yet may he which makes the claim enter upon the possession of the heir, &c.

§ 423. But in this case after the year and the day that such claim was made, if the father then died seised the morrow next after the year and the day, or any other day after, &c. then cannot he which made the claim enter; and therefore if he which made the claim will be sure at all times that his entry shall not be taken away by such descent, &c. it behoveth him that within the year and the day after the first claim made, to make another claim in form aforesaid, and within the year and the day after the second claim made, to make the third claim in the same manner, and within the year and the day after the third claim to make another claim, and so over, that is to say, to make a claim within every year and day next after every claim made during the life of his adversary, and then at what time soever his adversary dieth seised, his entry shall not be taken away by any descent. And such claim in such manner made, is most commonly taken and named Continual Claim of him which maketh the claim, &c.

§ 424. But yet in the case aforesaid, where his adversary dieth within the year and the day next after the claim, this is in law a continual claim, insomuch as his adversary within the year and the day next after the same claim dieth. For he which made his claim needeth not to make any other claim, but at what time he will within the same year and day, &c.

§ 425. Also, if the adversary be disseised within the year and the day after such claim, and the disseisor thereof dieth seised within the year and the day, &c. such dying seised shall not grieve him which made the claim, but that he may enter, &c. For whosoever he be that dieth seised within the year and the day after such claim made, this shall not hurt him that made the claim, but that he may enter, &c. albeit there were many dyings seised, and many descents within the same year and day, &c.

*Nota*, this space of time, of a year and a day, hath divers applications in our law, and a year and a day in many cases the law doth appoint for a convenient time; as by the statute *de modo levando fines*, made 18 E. 1. a year and day is given to make claim: and so it doth appear also by the statute *de donis conditionalibus*, made 13 E. 1.: so judgment final in a writ of the Common Bank shall bind all strangers, if they do not put [in] their claim within a year and a day after the judgment and execution; for in that case the year and day shall be accounted after execution; for by transmutation of possession the country hath notice of it. 8 Co. 100. Also in cases of estrays, if the owner, proclamations being made, do not claim it within a year and a day, it is forfeited; so a year and a day is given in case of appeal, and in case of descent after entry or claim; of a villein who does continue within the ancient demesne of the king; and of the death of a man who hath a blow or wound; *Protections. Fitz. N. B. 28 D. de essoins de service le roi.* And the year and day in case of wreck shall be accounted from the taking or seizure of them, as wreck; for although the property is in law vested in the law before seizure, yet, till the lord do seize and take it into his actual possession, it is not notorious who doth challenge or claim the wreck, nor to whom the owner may resort to make his claim, and to shew his proofs. 5 Co. 107 b, in *Sir Henry Constable's case.* Vide 4 Co. 100 a (1). *Fitz. tit. Non-ability*, 26, where it is holden, though a man or a woman be never professed, yet if they do remain by a year and a day in the order, they shall be taken as professed, and not after to be deraigned: also *Poliolbion*, 270, that the space of forty days, as well as a year and a day, hath with us divers applications; as in assise of fresh force, and the widow's quarantine, &c.; and to this purpose see in *Plowd.* 172 a.

§ 426. Also, if a man be disseised, and the disseisor dieth seized within the year and day next after the disseisin made, whereby the tenements descend to his heir, in this case the entry of the disseisee is taken away, for the year and day which should aid the disseisee in such case, shall not be taken from the time of title of entry accrued unto him, but only from the time of the claim made by him

(1) This reference is incorrect, and I have been unable to give the right one.—*Ed.*

in manner aforesaid. And for this cause it shall be good for such disseisee to make his claim in as short time as he can after the disseisin, &c.

§ 427. Also, if such disseisor occupieth the lands forty years, or more years, without any claim made by the disseisee, &c. and the disseisee a little before the death of the disseisor makes a claim in the form aforesaid, if so it fortuneth that within the year and the day after such claim the disseisor die, &c. the entry of the disseisee is congeable, &c. And therefore it shall be good for such a man which hath not made claim, and which hath good title of entry, when he heareth that his adversary lieth languishing, to make his claim, &c.

§ 428. Also, as it is said in the cases put, where a man hath title of entry by cause of a disseisin, &c. the same law is where a man hath right to enter by cause of another title, &c.

*Negligentia semper habet comitem infortunium.* 8 Co. 133 a.  
*Vigilantibus non dormientibus subveniunt jura.* 2 Co. fo. 10 et 28.  
 See at this day the statute made 21 Regis Jacobi, cap. 16.

§ 429. Also, of the said foresayings thou mayst know (my son) two things. One is, where a man hath title to enter upon a tenant in tail, if he maketh such a claim to the land, then is the estate tail defeated, for this claim is as an entry made by him, and is of the same effect in law as if he had been upon the same tenements, and had entered into the same, as is before said. And then when the tenant in tail immediately after such claim continue his occupation in the lands, this is a disseisin made of the same tenements to him which made such claim, and so by consequent, the tenant then hath a fee simple.

Here is shewed the effect and operation of continual claim, and of the law in that case: *vide* of this matter 3 E. 4. 25 a. 7 H. 6. 20.

9 H. 4. 6. 22 E. 4. 23 b: for continual claim is as much as an actual entry; for it shall defeat a warranty. 11 H. 6. 51. 14 H. 4. 5.

§ 430. The second thing is, that as often as he which hath right of entry maketh such claim, and this notwithstanding his adversary continue his occupation, so often the adversary doth wrong and disseisin to him which made the claim. And for this cause so often may he which makes the same claim for every such wrong and disseisin done unto him, have a writ of trespass, *Quare clausum fregit*, &c. and recover his damages, &c.

*Nota*, that after continual claim in due form of law made, as aforesaid, the party grieved may have an action of trespass, *quare clausum fregit*, and recover his damages, although he had no other actual possession in the lands or tenements.

§ 431. Or he may have a writ upon the statute of R. 2. made in the fifth year of his reign, supposing by his writ that his adversary had entered into the lands or tenements of him that made the claim, where his entry was not given by the law, &c. and by this action he shall recover his damages, &c. And if the case were such, that the adversary occupied the tenements with force and arms, or with a multitude of people at the time of such claim, &c. immediately after the same claim may he which made the claim for every such act have a writ of forcible entry, and shall recover his treble damages, &c.

Or he may have his remedy by a writ upon the statute made 5 R. 2. cap. 7; or, in case such entry be made with force and arms, the party may have his remedy against such his adversary by a writ of forcible entry, and thereby recover his treble damages by the statute made 8 H. 6. cap. 9. and if the reader be desirous to read at large of these matters, see in *Fard. Poulton's book*, fo. 34.

§ 432. Also, it is to be seen, if the servant of a man who hath title to enter, may by the commandment of his master make continual claim for his master or not.

§ 433. And it seemeth that in some cases he may do this: for if he by his commandment cometh to any parcel of the land, and there maketh claim, &c. in the name of his master, this claim is good enough for his master, for that he doth all that which his master should or ought to do in such case, &c. Also if the master saith to his servant, that he dares not come to the land, nor to any parcel of it, to make his claim, &c. and that he dare approach no nearer to the land than to such a place called Dale, and command his servant to go to the same place of Dale, and there make a claim for him, &c. if the servant do this, &c. this also seemeth a good claim for his master, as if his master were there in his proper person, for that the servant did all that which his master durst and ought to do by the law in such a case, &c.

§ 434. Also, if a man be so languishing, or so decrepid, that he cannot by any means come to the land, nor to any parcel of it, or if there be a recluse, which may not by reason of his order go out of his house, if such manner of person command his servant to go and make claim for him, and such servant dare not go to the land, nor to any parcel of it, for doubt of beating, maim, or death, &c. and for this cause the servant cometh as near to the land as he dareth for such doubt, and maketh the claim, &c. for his master, it seemeth that such claim for his master is strong enough, and good in law. For otherwise his master should be in a very great mischief; for it may well be that such person which is sick, decrepid, or recluse, cannot find any servant which dare go to the land, or to any parcel of it, to make the claim for him, &c.

These three sections are framed according to that rule, a servant is bound to obey all his master's commandments lawful; also another rule there is, *qui per alium facit per seipsum facere videtur, et è converso quod per me non possum, nec per alium*, as it is in 11 Co. 87 a: but if a stranger of his own head do enter into the

land, for and in the name of him that hath right, and doth make continual claim, and that without commandment precedent, or assent subsequent, this is not good (1). 9 Co. 106 a. *nota librum; et ibid.* 75. *Combe's case.* *Nota*, and here observe, as also it is observed in 9 Co. 76 b, and 77 a. that when a man hath authority to do or make any act as a servant, or as attorney, he ought to do it in the name of him who doth give the authority; for he doth appoint the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gave the authority. The same law is, for him that hath authority by letter of attorney to make livery and seisin.

§ 435. But if the master of such servant be in good health, and can and dare well go to the lands, or to parcel of it, to make his claim, &c. if such master command his servant to go to any parcel of the land to make claim for him, and when the servant is in going to do the commandment of his master, he heareth by the way such things as he dare not come to any parcel of the land to make the claim for his master, and therefore he cometh as near to the land as he dare for doubt of death, and there maketh claim for his master, and in the name of his master, &c. it seemeth that the doubt in law in such case shall be, whether such claim shall avail his master or not, for that the servant did not all that which his master at the time of his commandment durst have done, &c. *Quære.*

*Derivativa potestas non potest esse major primitiva. Finch, fo. 4 b.*

§ 436. Also, some have said, that where a man is in prison and is disseised, and the disseisor dieth seised during the time that the

(1) Lord Coke says, If an infant or any man of full age have any right of entry into any lands, any stranger in the name and to the use of the infant or man of full age may enter into the lands, and

this regularly shall vest the lands in them without any commandment precedent, or agreement subsequent. Co. Lit. 258 a. — Ed.

disseisee is in prison, whereby the tenements descend to the heir of the disseisor, they have said, that this shall not hurt the disseisee which is in prison, but that he well may enter, notwithstanding such a descent, because he could not make continual claim while he was in prison.

§ 437. But the opinion of all the justices, P. 11 H. 7. was, that if the disseisin be before the imprisonment, although the dying seised be, he being in the prison, his entry is taken away.

And also, if he which is in prison be outlawed in an action of debt or trespass, or in an appeal of robbery, &c. he shall reverse this outlawry pronounced against him, &c.

§ 438. Also, if a recovery be by default against such a one as is in prison, he shall avoid the judgment by a writ of error, because he was in prison at the time of the default made, &c. And for that such matters of record shall not hurt him which is in prison, but that they shall be reversed, &c. *à multò fortiori*, it seemeth that a matter in fact, *scil.* such descent had, when he was in prison, shall not hurt him, &c. especially seeing he could not go out of prison to make continual claim, &c.

The reason in these cases of imprisonment is, because he, that is imprisoned by judgment of law, ought to be *in salvâ et arctâ custodiâ*, that is to say, *salvâ* unto the party at whose suit he is in prison, because he must be in such strong prison, that he do not escape, and *arctâ*, in respect he ought to be kept close without conference with others, or intelligence of things at large, and may not go out of prison to make his claim; and that is cause also, that a recovery by default against him in a real action shall not bind him, but he may reverse it by writ of error, as it appeareth 5 E. 3. fo. 50 b. and 4 E. 2. tit. Discept. 51. in Fitz. and in our author. Vide 8 Co. 100 b: but the printer did mistake the book here vouched in the 437 sect. for it must be 9 H. 7. 24 b (1). See in Brooke, tit. Entry congeable, 91. and in Dyer, 143, in fine.



The Duke of Norfolk, 3 *et* 4 *P. et M.* 139. *pl.* 33, was disseised, being in prison, and a descent cast, but it would not bind him, though it would those in the remainder, because it was in prison.

§ 439. In the same manner it seemeth, where a man is out of the realm in the king's service, for the business of the realm, if such a one be disseised when he is in service of the king, and the disseisor dieth seised, the disseisee being in the king's service, that such descent shall not hurt the disseisee; but, for that he could not make continual claim, it seems to them that when he cometh into England, he may enter upon the heir of the disseisor, &c. For such a man shall reverse an outlawry pronounced against him during the time that he was in the king's service, &c. therefore, *à multò fortiori*, he shall have aid and indemnity by the law in the other case, &c.

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As imprisonment is a good excuse and defence in the precedent, so it is, if beyond the sea in another realm in the king's service; for in respect of the several places the disseisee could not be in another realm, and in England also at one time: also when the king's service is by the disseisee to be performed in another realm, where he is at the time of the disseisin done to him; the king's service, which is there to be performed, is to be preferred before his private at home; and therefore the law doth requite his obedience in that behalf under protection, so that no prejudice shall come unto him in the interim touching his private lands or estate within England. *Obedientia est legis essentia.*

§ 440. Also, others have said, that if a man be out of the realm, though he be not in the king's service, if such a man being out of the realm be disseised of lands or tenements within the realm, and the disseisor die seised, &c. the disseisee being out of the realm, it seemeth unto them, that when the disseisee cometh into the realm, that he may well enter upon the heir of the disseisor, &c. and this seemeth unto them for two causes: one is, that he that is out of the

realm cannot have knowledge of the disseisin made unto him by understanding of the law, no more than that a thing done out of the realm may be tried within this realm by the oath of twelve men; and to compel such a man to make continual claim, which by the understanding of the law can have no knowledge or cognizance of such disseisin made or done, this shall be inconvenient, namely, when such a disseisin is done unto him when he was out of the realm, and also the dying seised was done when he was out of the realm; for in such case he may not by possibility after the common presumption make continual claim; but otherwise it should be if the disseisee were within the realm at the time of the disseisin, or at the time of the dying seised of the disseisor.

And in 8 Co. 101, in *Sir Richard Lechford's case*, it was resolved, that he that is out of the realm in such a case, although he was not in the king's service, yet he shall not be barred from his entry; because he could not by intendment of law have notice. And at the common law he should not be barred by non-claim upon a fine, or upon a writ of right; and there you may read divers books vouched for the proof thereof. And in this case it is, that things made out of the realm cannot be tried within the realm, by the oath of twelve men, but of that matter, *nota Dowdale's case*, in 6 Co. 46, where it is said, that things merely and totally done beyond the sea, shall not be tried here in England; but if a contract be made in England, for a thing to be done beyond the sea, this matter may be tried in England: and see 7 Co. 27 a, that juries may take knowledge of things done out of England in divers cases, and see the *Doctor et Student*, li. 2. cap. 2. and *Perk. cap. 7. in fine*, fo. 95 b. And in the conclusion of this section it is said, if the disseisee be within the realm at the time of the disseisin, or at the time of the death of the disseisor, then the disseisee is barred from his entry in this case; and the reason and causes hereof is, the folly of the disseisee, who had time to enter before his journey made beyond the sea; *et negligentia semper habet comitem infortunium; et vigilantibus non dormientibus subveniunt jura*; and according *nota* 8 Co. 100 b. and 7 H. 7. 24 b. and *Brooke, Entry congeable*, 91. and *nota in Dyer*, 143 b.

§ 441. Another matter they allege for a proof that before the statute of King Edward the Third, made the 34th year of his reign, by which statute non-claim is ousted, &c. the law was such, that if a fine were levied of certain lands or tenements, if any that was a stranger to the fine had right to have and to recover the same lands or tenements, if he came not and made his claim thereof within a year and a day next after the fine levied, he shall be barred for ever, *quia dicebatur quòd finis finem litibus imponebat*. And that law was such, it is proved by the statute of Westm. 2. *de donis conditionalibus*, where it is spoken if the fine be levied of tenements given in the tail, &c. *quòd finis ipso jure sit nullus, nec habeant hæredes, aut illi ad quos spectat reversio (licet plenæ ætatis fuerint in Angliâ, et extra prisonam) necessitat' apponere clameum suum, &c.* So it is proved that if a stranger that hath right unto the tenements, if he were out of the realm at the time of the fine levied, &c. shall have no damage, though that he made not his claim, &c. though that such fine was matter of record: by greater reason it seemeth unto them, that a disseisin and descent that is matter in deed, shall not so grieve him that was disseised when he was out of the realm at the time of that disseisin, and also at the time that the disseisor died seised, &c. but that he may well enter, notwithstanding such descent.

The statute made 34 E. 3. cap. 16. here mentioned, is in these words: *Item*, it is recorded, that the pleas of non-claim of fines, which from henceforth be to be tried, shall not be taken or holden for any bar in time to come; but before the statute by the common law fines levied were of so great force, that they did bind all strangers, except those that had certain defects, if they did not enter, nor put their claim within a year and a day: *Plowd. 359 b*: and this common law did bring great commodity unto the people of this realm concerning the security of their inheritances, *expedit reipublicæ ut sit finis litium*, and fines have been of very great antiquity at the common law; for they have been so long as any court of record hath been; and in *Plowden's Com. 369 a*, Catlyne, Chief Justice, doth cite many fines of antiquity, some before the con-

quest, and divers after the conquest, till the time of E. 1. in the 18th year of whose reign a statute *de modo levando fines* was made. But this act made 34 E. 3. cap. 16. did take away non-claim, by which fines were enfeebled, and it was to the universal inquietation of all the realm in their inheritances: nevertheless two great causes have been observed, wherefore the said statute *anno* 34 E. 3. cap. 16. was made to revoke that non-claim within a year and a day, which was at the common law; first, if tenant for life did not make his claim within the year and day, but suffer that time to pass, he in the remainder, or in the reversion, was bound at the common law; for they all, that is to say, the particular tenant, and they in the remainder, or reversion, should have but one year after the fine levied. *Plowd.* 359 *a.* See 6 *Co.* 8 *a.*, *b.*, 9 *a.* The second cause, a *femme covert* at the common law was bound by non-claim [because she had a husband who might make it] and this was one of the causes that the said statute 34 E. 3. cap. 16. was made, as it appeareth in 8 *Co.* 100 *b.* And observe, that for the avoiding of those inconveniences which were at the common law, and yet to restore fines to their former puissance, another statute was made 4 H. 7. 24. which read. And touching the argument which Littleton doth make in the end of this section, *à fortiori*, *nota* in 8 *Co.* fo. 100. and the apt application thereof to a case there in question concerning a customary, or a copyholder.

§ 442. Also, inquire if a man be disseised, and he arraign an assise against the disseisor, and the recognitors of the assise chant for the plaintiff, and the justices of assise will be advised of their judgments until the next assise, &c. and in the mean season the disseisor dieth seised, &c. yet the said suit of the assise shall be taken in law for the disseisee a continual claim, insomuch that no default was in him, &c.

I do not conceive wherefore the author doth make a *quære* of this case; for it seemeth clear, and without doubt, that for so much as there was no default in the disseisee himself, but in the court, wherefore judgment was not given immediately, but that this suit, in pursuing his assise shall amount in law to a continual claim: and

in 35 H. 6. fo. 4, Prisott did put this case; if a man do bring a writ of privilege and the justices will be advised till the next term, whether they will allow of the writ, or no, and in the mean time the plaintiff is put from his service, or his master is discharged from his office; yet if this *supersedeas* is allowable, it shall be allowed, because the delay was by the default of the court, and not by any default of the plaintiff; and upon this reason is the rule in 6 Co. 68, *quod remedio destituitur ipsâ re valet, si culpa absit*. The law is, that if an infant do levy a fine, if he do not reverse it during his non-age, it shall bind him and his heirs; but if an infant do bring his writ of error to reverse the said fine, and before the same be adjudged, the next term is adjourned by proclamation, and before the next term, after adjournment, the infant doth accomplish his full age of twenty-one years, yet because there was no default in him, but the adjournment was the act of the court, and of the law, therefore the fine may be reversed, and to this effect note sect. 425.

That in many cases concerning time the law doth give a year and a day; as, namely, in case of wreck of the sea, in which case the party who claimeth property in those goods may have a commission *de oyer et terminer* the matter, or otherwise he may by action have it tried; and if the commission be awarded, or the action be commenced, within the year and day, although the verdict be given after, it shall be sufficient. *Vide 7 Co. fo. 31 b.* And to conclude this matter I will set down the divers words in *Plowd. 359 a.* Claim is a challenge by any man of the property or ownership of a thing, which he hath not in possession, but is detained from him by wrong; and to avoid fines at the common law there were four claims, that is to say, two by record, and two by acts to be done in the country, *scil.* by record, 1. by a real action brought within the year, according to the verity of the cause; and 2dly, by entry of the claim in record of the foot of the fine. By the country, 1. a lawful entry in the lands by him who had right, and expulsion of the cognizee, or ter-tenant; 2dly, continual claim.

§ 443. Also, inquire if an abbot of a monastery die, and during the time of vacation a man wrongfully entereth in certain parcels of land of the monastery, claiming the land unto him and his heirs, and of that estate dieth seised, and the land descendeth unto his

heirs, and after that an abbot is chosen, and made abbot of the monastery, a question is, if the abbot may enter upon the heir or not. And it seemeth to some, that the abbot may well enter in this case, for this, that the convent in time of vacation was no person able to make continual claim; for no more than they be personable to sue an action, no more be they able to make continual claim, for the convent is but a dead body without head; for in time of vacation a grant made unto them is void; and in this case an abbot may not have a writ of entry upon disseisin against the heir, for this, that he was never disseised. And if the abbot may not enter in this case, then he shall be put unto his writ of right, &c. which shall be hard for the house; by which it seemeth to them, that the abbot may well enter, &c.

*Quæras de dubijs, legem bene discere si vis :*

*Quærere dat sapere, quæ sunt legitima verè.*

This last section of this chapter is well to be observed, as it is set down by the author; and it seemeth to me that Littleton did make a *quære* of this matter, not for the difficulty of the case, but to incite the student to a diligent search of the reasons thereof; and the words in this case do give occasion to consider, that after the death, &c. of an abbot, the convent of the monastery are dead persons in the law, as a body without a head, and *sede vacante* a grant made unto them, or by them, is void; and they [have] no capacity to sue or be sued, which doth agree with the section 655. And when any intrusion is made upon any of the possessions of the monastery, in such time of vacation, the successor cannot have a writ of entry *sur disseisin*, or an assise of *novel disseisin*, because he was [not] disseised; and therefore if the law did not give allowance that the successor may enter, then he should be without remedy, except only in a writ of right, which could be over hard for the house. *Vide Fortescue, cap. 13.* But *nota*, in 10 Co. 30 b, that divers corporations may be without any head, and in 18 E. 4. 16, Starkey saith, a body politic cannot be dead by the death of the abbot; for if so, then it should be necessary to have a new creation, which may not be; and by action of trespass, or for other things done *tempore vacationis*, the successor shall punish *ut in jure ecclesiæ*; therefore it appeareth, that the frank-tenement doth abide in the whole body, and afterwards when a head is joined to

this body politic, wherefore should he not have cause to punish this trespass, which was made upon the frank-tenement; for when an injury or wrong is done to them, the correction and the punishment of it is given to the successor; for none will deny but that the successor shall have a writ of waste *ad exhæredationem domus et ecclesiæ tempore predecessoris*; and none will deny, but in this case he may waive the possession, and bring a writ of entry *sur disseisin*, in which case he shall recover the land and his damages. *Vide Stat. Marlbridge, cap. 38. et Theloall. li. 1. fo. 25. et seq.* Also by occasion that in this section mention is made of the election of an abbè, or making of an abbè to be the head of the monastery, something shall be said thereof; and it is to be known, that abbès, who were the heads of such dead persons in law, were in ancient time made by the pope, as a spiritual officer. 14 H. 3. 6. But the king did make such abbè, being head of that spiritual corporation, able to purchase to the use of the house, as in that also appeareth. *Vide Finch, 138 b.* For of temporal lands the pope never had nor claimed any jurisdiction; but the kings of this realm, before any such claim, or pretence of the pope, were wont to give all the great dignities, or offices, of the church: *Finch, lib. 4. 130 b*: for so we read, that Kenulphus, who reigned here in *anno domini* 755, by his letters patent did discharge the abbè of Abingdon, now called Abington, and exempted him from the episcopal jurisdiction, and by the same charter did grant unto him ecclesiastical jurisdiction, which charter, granted more than 800 years since, was afterwards confirmed by Edwinum Britaniæ Anglorum Regem et Monarcam, which is at large to be read in 1 Co. of his 5th book, fo. 10. in the case of the king's ecclesiastical law; and *ibidem, fo. 14 b*; and that all such chief dignities at the first were donative, it is certain that Alfred, and Athelstane, Edgar, and Edmond, Canutus, and Edward the Confessor, and divers of the kings of the Saxon race, did give all the bishoprics in England *per annulum et baculum*, without any other ceremony, as the Emperor, and the French King, and other Christian princes, were wont to do. *Vide Sir John Davies, 88 b, 89 a.* But afterwards succeeding kings of this realm did grant unto the chapter in all such cases a kind and form of election, *a multis annis retroactis*, saith Ingulphus, Abbot of Crowland, who lived at the Norman conquest, *nulla electio prelatorum erat merè libera, et canonica, sed omnes dignitates, quam Episcoporum, quam Abbatum per annulum et baculum Regis Curia pro sua complacentia conferebat*; so, though the election was in the clergy, yet the con-

firmation was in the king, by these ceremonies by staff or rod and ring. *Read John Selden, 2 part. fo. 200. et seq. in his Titles of Honor.* But this manner of investing by *baculum pastoralem et annulum*, after the time of King Henry 1. was no more used, but by the king's election they were canonically elected, and being elected, the king gave his royal consent to their election, and restitution of their temporalities did fully invest them: see the stat. *Provisor*, and 25 E. 3. 118 b. and though this course of election began to be in use in the time of R. 1. and H. 2. I find it not confirmed by any constitution or charter before the time of King John, who by his charter, dated the 15th of June, in the 16th year of his reign, granted this privilege to the Church of England, in these words which you may read in *Sir John Davies' book*, 91 b, and 92 a. The first grant of election that I read of was made by Edgar the King to the Abbè of Glassenbury. *J. Selden*, 201, *Titles of Honor.* But now see the statute 29 H. 8. cap. 20. fo. 6. 51. and the statute 1 E. 6. cap. 2. and it appeareth in *Fitz. N. B.* 169 a, b, and 170 b, that the dean and chapter may not choose a bishop, nor the convent an abbè, or prior, which are of the king's foundation, without the *congé le roi*, and there is a writ in the Register to signify unto the ordinary the royal assent to the election of an abbè.

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### LIB. III. CAP. VIII.—RELEASES.

§ 444. Releases are in divers manners, viz. releases of all the right which a man hath in lands or tenements, and releases of actions personals and reals, and other things. Releases of all the right which men have in lands and tenements, &c. are commonly made in this form, or of this effect:—

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Before, the author hath treated all the several estates which men have in lands and tenements, or other hereditaments, or chattels, [which] shall descend, or be legally transferred from one to another; now in this chapter he also teacheth how the right which a man hath to lands or hereditaments, and to other things, whereof another is in possession, may be also transferred or extinguished by releases. Therefore releases be made in divers manners, that is to say, releases of all the right which a man hath in lands or tenements, and releases



of actions personal, or real, or other things. And the doctrine of releases is carefully to be observed; for it is of great use and consequence; for a right or title which a man [has] to any freehold, cannot be barred by any other means, (but by a release or confirmation, or act which doth tantamount); for [a right or title of freehold cannot be barred] by accord with collateral satisfaction, although satisfaction be of [as] high nature as the right of freehold is, and of equal or greater value. 4 Co. 1 *b*, *Vernon's case*; and 9 Co. 79. And therefore is very observable in 10 Co. fo. 48 *a*, the great sapience and policy of the sages and founders of our law, who have provided, that no possibility, right, title, or things in action, shall be granted or assigned to strangers; for that would be occasion of multiplication of contentions and suits, to the great oppression of the people, and principally of ter-tenants, and to the subversion of the due and equal execution of justice. But all rights, titles, and actions may, by the prudence and policy of the law, be released, being duly made; for thereby repose and quiet is wrought and made amongst men, so that every man may live in his vocation in peace and plenty: *vide librum inde*; *et ibid.* fo. 50 *a*, and in 4 Co. 66 *b*, that an interest executory by a devise may be released, which cannot be granted; and for the better explanation of the words, see in 10 Co. 52 *b*; properly *laxare* is, to put a man who is in prison in fetters at liberty; and *relaxare* is, to do so often; and *metaphoricè relaxare* is, to put at liberty fettered estates and interests, and to make them free and absolute.

§ 445. *Know all men by these presents, that I, A. of B. have remised, released, and altogether from me and my heirs quit claimed: or thus, for me and my heirs quit claimed to C. of D. all the right, title, and claim which I have, or by any means may have, of and in one messuage with the appurtenances in F. &c. And it is to be understood, that these words, remisisse, et quietum clamasse, are of the same effect as these words, relaxasse.*

And in this section the author doth shew to the student a pattern, how to make and frame a release effectual in law; for the student must not only endeavour to be judicious in the matters of law, but also to be artificial in the fashioning of writings and instruments: and to that purpose the author hath set down certain precedents,

as well before as now, which you may see, *sect. 74, 76, 371, 372, 445*. See 10 Co. 92 *b*, that to every release or other deed or instrument, two things are requisite and necessary; the one, that it be sufficient in law, and this is called the legal part, because the judgment thereupon doth appertain unto the judges of the law; the other doth concern matters *in fait*, and this doth appertain to the trial in the country. And therefore every deed ought to approve itself, and be proved by others, approve itself by the shewing forth in court in two manners; first, as to the composition of the words, to be sufficient in law, and this the court shall judge; secondly, that it is not rased or interlined in points or places material, which shall be tried by the country. *Vide librum*. It is observable, that here, and in many other cases, the preterperfect tense is taken for the present tense, as *dedimus et concessimus, pro, damus et concedimus*: 10 Co. 67 *a*: and more examples of construction of words, see in *Egerton's Post-nati*, 49.

And Littleton here saith, that it is not of necessity that all these three words *remisisse, relaxasse, et quietum clamasse*, be in every release; for any one of them are of the like force as the other; and yet I have seen a note, that it hath lately been resolved in the common place, that a copyholder cannot release unto his lord by this word (*relaxasse*) only, but by the word *remisisse* he may, for this doth amount to as much as words of surrender.

§ 446. Also, these words, which are commonly put in such releases, *scil. (quæ quovismodo in futurum habere potero)* are as void in law; for no right passeth by a release, but the right which the releasor hath at the time of the release made. For if there be father and son, and the father be disseised, and the son (living his father) releaseth by his deed to the disseisor all the right which he hath or may have in the same tenements without clause of warranty, &c. and after the father dieth, &c. the son may lawfully enter upon the possession of the disseisor, for that he had no right in the land in his father's life, but the right descended to him after the release made by the death of his father, &c.

But these words, which be commonly put in such deeds of releases, that is to say, *quæ quovismodo in futurum habere potero*,

are but as void words in the law, for the reason and cause in the book mentioned: the like unnecessary clause you may see in the first section of Littleton, where it is said, tenant in fee simple is he who hath lands or tenements to have and to hold to him and to his heirs for ever. See *sect.* 177. And therefore it is well said in 10 Co. 34 *a*, there be many clauses inserted in charters, as well of the king, as of others, *ex consuetudine clericorum*, which are not *de necessitate legis*; some declaratory and explanatory, and some prolix and nugatory; *sed lex multa proficientia et proficientia cum paucis comprehendit. Vide ante, sect.* 331; *et* 6 Co. fo. 43 *b*. *Hæc fuit candida illius ætatis fides et simplicitas, quæ pauculis [lineis] omnia fidei firmamenta posuerunt:* and in 10 Co. 30 *b*, *prudens antiquitas* did always comprehend much matter in a small room; and in 5 Co. 127, *dicitur breve, quia rem breviter enarrat. Vide Abraham Fraunce, 52 b.*

And the author, in proof of his assertion in this place, doth put the case, if there be father and son, and the father is disseised, and the son (living his father) do by his deed release unto the disseisor all the right which he hath or hereafter may have in the same tenements, (so it be without warranty—[of the] force of a warranty, in that case more shall be spoken in that chapter), and after the father dieth, the son may lawfully enter upon the possession of the disseisor, his own release notwithstanding; and the reason is, because he had no right to the land during the life of his father; but the right did come to him by descent, after the release made, by the death of his father: and agreeable to this is *Bracton, li. 2. fo. 58 b, item videndum quando quis possit confirmare, et sciendum non prius quam jus ei accidit:* and *Bracton, li. 2. cap. 19, and li. 4. fo. 265*, saith, *hæres dicitur ab hæreditate [et non hæreditas] ab hærede:* and see 8 Co. 54 *a*. *Vide Plowd. fo. 45 b, according.* And therefore the eldest son is not in common appellation (during his father's life) said to be his father's heir; for no man can have an heir during his life; but the eldest son in that case is said to be heir apparent to his father. *Plowd. 289 b*; and see 8 Co. 54 *a*. And many other books are cited in 10 Co. fo. 47 *b*, proving this case put by Littleton to be law; and *ibid. fo. 51*, where this case of Littleton was agreed, because the son had not any right of his father, nor any foundation, or original inception of any right; and this case of the release made by the son to the disseisor of his father, is put in 1 Co. 111 *b*, and in 10 Co. 47 *b*, to prove that a possibility cannot be released: *cave lector*; and see more of this matter when I come to the *sect.* 748.

10 Co. 50 a. b. And to conclude this section, note the different power of a release, and a feoffment by livery and seisin; for it is here taught, that no right doth pass by a release, but that right which the releasor hath at the time of the release made. But if the son doth disseise his father, and do make a feoffment, and the father die before he hath avoided the livery, in that case the son is concluded: 39 H. 6. 43 a. 1 Co. 111 b: for a livery is of such force, that it doth give and not only exclude the feoffor of all present rights, but also of all future rights and titles: whereof see many examples and book cases cited in 1 Co. 111 b, *Albany's case*: and in 6 Co. 70 a. By feoffment of the land, all rents issuing of the land are discharged, and the seignory, dower, warrant, curtesy, and term; for all the right of the feoffor doth pass included. 4 H. 7. 17. 8 H. 7. 4. 9 H. 7. 1, et 25. 11 H. 7. 20 b, and 25 a. b. And this ground by Littleton is said to be infallible, in *Dyer*, 56 b. 57 a.

§ 447. Also, in releases of all the right which a man hath in certain lands, &c. it behoveth him to whom the release is made in any case, that he hath the freehold in the lands in deed, or in law, at the time of the release made, &c. For in every case where he to whom the release is made, hath the freehold in deed, or in law, at the time of the release, &c. there the release is good.

According to this case it is said in 10 Co. fo. 48 a, that a right or title of frank-tenement, whether it be *in futuro*, or *in præsentia*, may be released in five manners; whereof one is, to the tenant of the freehold *in fait*, or in law, without any privity; and there, and hereafter in this chapter the other four are to be read.

§ 448. Freehold in law is, as if a man disseiseth another and dieth seised, whereby the tenements descend to his son, albeit that his son doth not enter into the tenements, yet he hath a freehold in law, which by force of the descent is cast upon him, and therefore a release made to him so being seised of a freehold in law, is good enough; and if he taketh wife being so seised in law, although he never enter in deed, and dieth, his wife shall be endowed.

And in this section is described, what a frank-tenement in law is, and the effect thereof; that is to say, that a release made to him that hath but a frank-tenement in law is good; and if he that hath such a frank-tenement in law do take a wife, and dieth, his wife shall be thereof endowed, although her husband did never enter *in fait* into the tenements; and to that effect see *segt.* 680, 681, where also is declared another effect and consequence of a frank-tenement in law; that is, an estranger, who hath cause to bring an action for the said land, may have a *præcipe quod reddat* against a tenant of the freehold in law, and a frank-tenant in law may make a *remitter*.

§ 449. Also, in some cases of releases of all the right, albeit that he to whom the release is made hath nothing in the freehold in deed nor in law, yet the release is good enough. As if the disseisor letteth the land which he hath by disseisin to another for term of his life, saving the reversion to him, if the disseisee or his heir release to the disseisor all the right, &c. this release is good, because he to whom the release is made, had in law a reversion at the time of the release made.

Before is sufficiently said, that he that hath a frank-tenement or inheritance in him *in fait*, or in law, is capable to accept a release; and this case is, if a disseisor do lease the lands which he hath by disseisin, unto another for term of life, saving the reversion to himself; if the disseisee or his heir do release to the disseisor all his right, this release is good, although he to whom the release is made hath nothing of the freehold in deed, or in law; because he to whom the release was made had in him a reversion at the time of the release made, which is the third case mentioned in 10 Co. 48 b. And in this case it is observed, that the release is good, though there was no privity between the disseisee and him in the reversion; for as it is in *Plowd.* 157 a, a reversion of land is that part of the land which is left to him who makes the particular estate, and [may] well be called the residue or remnant of the land; and land is comprised in this word "reversion" of land, as by this case is proved.

§ 450. In the same manner it is, where a lease is made to a man for term of life, the remainder to another for term of another man's

life, the remainder to the third in tail, the remainder to the fourth in fee, if a stranger which hath right to the land releaseth all his right to any of them in the remainder, such release is good, because every of them hath a remainder in deed vested in him.

§ 451. But if the tenant for term of life be disseised, and afterwards he that hath right (the possession being in the disseisor) releaseth to one of them to whom the remainder was made, all his right, this release is void, because he had not a remainder in deed at the time of the release made, but only a right of a remainder.

These cases shew the difference, when he that hath right doth release to him that hath a remainder *in fait*, and when he to whom this release is made hath but a right to have a remainder; for in this last case a release made to him is void.

§ 452. And note, that every release made to him which hath a reversion or a remainder in deed, shall serve and aid him who hath the freehold, as well as him to whom the release was made, if the tenant hath the release in his hand to plead.

§ 453. In the same manner it is, where a release is made to the tenant for life, or to the tenant in tail, this shall enure to them in the reversion, or to them in the remainder, as well as to the tenant of the freehold, and they shall have as great advantage of this, if they can shew it.

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These two cases are at large put in 10 Co. fo. 93, and the reason in both cases is, because there is a privity in estate between him in the reversion or remainder, and the tenant for life. And yet it is observable, that the deed in these cases doth only appertain unto that party, to whom it was made; and therefore *nota*, in these and many cases the law doth necessarily require, that the deed of release be brought forth, and shewed in court, and the reason that deeds so pleaded shall be *monster* in court read at large, *Ibid.* 92 a. *Vide* sect. 375, 376, 377, 573, 748. But *nota*, a good diversity taken and agreed in 6 Co. 38, when a deed is requisite *ex institutione legis* it must be shewed in court, although it doth concern a thing collateral,

which doth not transfer or convey any thing; as, the mayor and commonalty of London hath an estate for the life of J. at S.; if the mayor and commonalty of London do attorn to the grantee of the reversion, the law doth require that this attornment be by deed; for although the grantee doth not claim in by them who did attorn, and that attornment is only but consent; yet in pleading, the deed of attornment must be shewed forth; for the deed is requisite *ex institutione legis* in this case. But when a deed is requisite *ex provisione hominis*, that shall not change the judgment of law in that case; as if a man make a lease for years of lands to A., upon condition, that he shall not assign it over, but by a deed only, and not by word; in this case *ex provisione hominis* the assignment must be by deed; but because it is not necessary to the assignee *de institutione legis*, therefore he may plead the assignment without shewing the deed. *Vide librum.*

§ 454. Also, if there be lord and tenant, and the tenant be disseised, and the lord releaseth to the disseisee all the right which he hath in the seignory or in the land, this release is good, and the seignory is extinct: and this is by reason of the privity which is between the lord and the disseisee. For if the beasts of the disseisee be taken, and of them the disseisee sueth a replevin against the lord, he shall compel the lord to avow upon him; for if he avow upon the disseisor, then upon the matter shewn the avowry shall abate, for the disseisee is tenant to him in right and in law.

The author having before declared, that a right or title which a man hath to a freehold may be released: 1. To the tenant of the frank-tenement in deed or in law. 2. To him in the remainder. 3. To him in the reversion; now fourthly he saith, that a release is good if it be made to him that hath a right only; because of the privity which is between him that maketh the release, and him to whom the release was. As if the tenant be disseised, and the lord doth release to the disseisee all the right which he hath in the seignory, or in the land, this release is good, and the seignory is extinct. 10 Co. 48 b, according; and 3 Co. 23 b, and 25 a; and see more, ante, sect. 390. *Vide in 10 Co. 44 b*, if the tenant be disseised, the lord may release his services to the disseisee in respect of the privity

and right, without any estate; and proof hereof the author affirmeth, if the tenant be disseised, and the lord do distrain the cattle of the disseisee, and thereupon he sueth a replevin; if the lord do avow upon the disseisor, who is tenant in possession, the disseisee by pleading of the special matter shall abate the avowry of the lord upon the disseisor, and compel him to avow himself; because the disseisee is tenant unto him in right, and in the law: agreeable to which is 9 Co. 20 b, 21 a, that the law will not esteem him that is the very tenant in law, to be an estranger unto the lord; and the false avowry of the lord upon a stranger, who is not tenant, shall not hurt the tenant against the truth of the [fact], *quia veritas nihil veretur nisi abscondi*; and the law will never permit falsity to suppress truth. And this principal case put by Littleton, is mentioned in 3 Co. 35, approving thereby, among other examples, that the disseisee in the judgment of law hath the land still to many purposes. *Vide librum*. And in 6 Co. 58 a, it is said, "if lord and tenant be, and the tenant maketh a feoffment in fee, the feoffor, before notice and tender of the arrearages, may give seisin; for he is tenant as unto the avowry; (8 H. 6. 18.) for in such case if the lord do avow upon the feoffee, before tender of the arrearages, he shall lose them. 7 E. 3, and 7 H. 4. Therefore, for so much as the law doth compel the lord to avow upon the feoffee, therefore at the common law such a seisin by the feoffor *causâ necessitatis*, is good.

§ 455. Also, if land be given to a man in tail, reserving to the donor and to his heirs a certain rent, if the donee be disseised, and after the donor release to the donee and his heirs all the right which he hath in the land, and after the donee enter into the land upon the disseisor; in this case the rent is gone, for that the disseisee, at the time of the release made, was tenant in right and in law to the donor, and the avowry of fine force ought to be made upon him by the donor for the rent behind, &c. But yet nothing of the right of the lands, (*scil.*) of the reversion, shall pass by such release, for that the donee to whom the release is made, then had nothing in the land but only a right, and so the right of the land could not then pass to the donee by such release.



The precedent case is, the lord and very tenant, and the tenant was seised, &c. ; but this section is, of a tenant in tail where is a rent reserved to the donor and his heirs ; [if the donee be disseised, and after the donor release] to the donee and to his heirs all the right which he hath in the land, and after the donee entereth into the land upon the disseisor, in this case the rent is gone and extinct, and that for the reason in the former case, (*scil.*) because the disseisee at the time of the release made, was tenant in right, and in the law, unto the donor ; and avowry of fine force must be made upon him by the donor for the rent behind. And *nota*, 10 Co. 48 b, it is resolved, that in some cases he that hath a right only is capable to take a release in respect of the privy and right without any estate, as in the former case, where the very tenant is disseised : and in some cases the release is good in respect of the privy only without right ; as if tenant in tail do make a feoffment in fee, the donee after the feoffment hath not any right, and yet in respect of the privy only the donor may release to him the rent, and all services saving fealty ; so the defendant may release to the vouchee in respect of the privy only ; but no estate can pass by release, but unto him who hath estate in privy, and not in respect of a right or privy only ; and so doth the author conclude this section in these words, but yet nothing of the right of the land, that is, of the right of the reversion, doth pass.

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§ 456 (1). In the same manner it is, if a lease be made to one for term of life, reserving to the lessor and to his heirs a certain rent, if the lessee be disseised, and after the lessor release to the lessee and to his heirs all the right which he hath in the land, and after the lessee entereth, albeit in this case the rent is extinct, yet nothing of the right of the reversion shall pass, *causâ quâ supra*.

§ 457. But if there be very lord and very tenant, and the tenant maketh a feoffment in fee, the which feoffee doth never become tenant to the lord, if the lord release to the feoffor all his right, &c. this release is altogether void, because the feoffor hath no right in the land, and he is not tenant in right to the lord, but only tenant as to make the avowry, and he shall never compel the lord to avow upon him, for the lord shall avow upon the feoffee if he will.

(1) This section is copied into the Commentary without any addition.—*Ed.*

*Contraria contrariis addita magis elucescunt*; and therefore it is now said, if there be very lord and very tenant, [and very tenant] doth make a feoffment in fee, and the feoffee did not become tenant to the lord, if the lord do release to the feoffor all his right, &c. this release is utterly void: and the reason is, because the feoffor, after the feoffment made, had no right in the land, and he is not tenant in right unto the lord, but only his tenant as unto the making of avowry: but he cannot in this case compel the lord to avow upon him, because by this feoffment, which is his own act, he hath conveyed all his estate, and all his right to his feoffee; and therefore the lord may avow upon the feoffee, if he will: and yet *nota*, 6 Co. 58 a, upon another point, if the lord and tenant be, and the tenant maketh a feoffment in fee, before notice and tender of arrearages, the feoffor may give seisin to the grantee, for he is tenant as to avowry; 8 H. 6. 18; for in this case, if the lord do avow upon the feoffee before tender of the arrearages, he shall lose them, as it is agreed in 7 E. 3. and 7 H. 4, &c. And because in that case the common law doth drive the lord to avow upon the feoffor, therefore at the common law such a seisin by the feoffor, *causa necessitatis*, was good. And upon the reason of Littleton's case, that notwithstanding the feoffment made by the tenant, he is tenant to the lord, if he will, as to make avowry upon him, the books are, in 3 Co. fo. 23 b, and 24 a, and in *Dyer*, 247 b, and 248 a, that if lessee for years do grant over all his estate and term to another, that for the rent behind after the assignment the lessor may have an action of debt, as he may avow in the other case for rent incurred after the assignment; for the case of the lessee for years is in the personalty, and more in the personalty than the cause of avowry.

§ 458. Otherwise it is, where the very tenant is disseised, as in the case aforesaid; for if the very tenant who is disseised, hold of the lord by knight's service and dieth, (his heir being within age), the lord shall have and seize the wardship of the heir, and so shall he not have the ward of the feoffor that made the feoffment in fee, &c. so there is a great diversity between these two cases.

This case doth pursue the different cases before; for saith he, otherwise it is where the very tenant is disseised, as in the case afore-

said; for if the very tenant who is disseised, do hold that land of the lord by knight's service, and die, his heir being within age, the lord shall have and may seize the wardship of his heir, but he shall not have the wardship of the heir of the feoffor, who made the feoffment in fee, so there is great diversity between the two cases. And according it is agreed, in 3 Co. 35 a, that the disseisee in judgment of law hath the land to many purposes, as before is said; for first of all he hath the land to forfeit; for if he be attainted of treason or felony, he shall forfeit the land. 2dly. If he die without heir, the land shall escheat to the lord. 3dly. The disseisee shall compel the lord to avow upon him as his very tenant, *ut antea*: and Littleton there saith, that the disseisee is tenant in law. 4thly. If he die, his heir within age, the lord shall have the wardship, and the lord shall have a writ of right of ward, and the writ shall say, *terram illam tenuit*: with this doth agree *Fitz. N. B. in the writ of Escheat*, 144; and *nota* a diversity in *Stamf. Prerog. fo. 155 b.*

§ 459. Also, if a man letteth to another his land for term of years, if the lessor release to the lessee all his right, &c. before that the lessee had entered into the same land by force of the same lease, such release is void, for that the lessee had not possession in the land at the time of the release made, but only a right to have the same land by force of the lease. But if the lessee enter into the land, and hath possession of it by force of the said lease, then such release made to him by the feoffor, or by his heir, is sufficient to him by reason of the privity which by force of the lease is between them, &c.

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This case is of all to be observed; for it seemeth, that a lessee for years, before he entereth by virtue of his lease hath no possession therein, and therefore a release at such time made to him is void: he that hath but a future [interest] cannot surrender it by express words. 4 H. 7. 10 b. 10 Co. 52 b. So if his lessor do grant his reversion, the lessee cannot attorn before he hath entered and taken possession; for his attornment is void, as appeareth, *sect. 567*. And to this purpose it is said in *sect. 58*, that when the lessee doth enter by force of his lease, then he is tenant for term of years. 5 H. 7. 13 b. 14 a. And thereupon it is said in 5 Co. 2d pt. fo. 124 b.

that before the lessee do enter, as he had no possession, so as it seemeth the lessor had not such reversion, as that he might grant it over by name of a reversion: nevertheless, observe in *sect. 66*, that if a man let lands to another for term of years, although the lessor die before the lessee do enter, yet he may enter after the lessor's death, because the lessee by force of the lease had a right presently to have possession of the tenements according to the tenor and form of the lease. *Vide sect. 41 (1)*, and in *5 Co. 124 b*, it is resolved, if the lessor die before the lessee enter, he who hath the estate for years may grant it, because of his right; for such a lessee for years hath more than he who hath a future interest for years to commence at Michaelmas; for the other may enter presently when he will, and take the present profits, which he may grant over, and his right may be divested out of him, and put unto a mere right not grantable, and by consequence a fine levied by the tenant of the frank-tenement, and five years past without claim may bar him, if he do not enter, and make his claim according to the stat. 4 H. 7. cap. 24; but in the case of a future interest the fine shall not bar him. *Saffyn's case*, *5 Co. 124*. And more concerning this section, see in *Plowd. 423 a*: à fortiori a release made by him in reversion to a lessee for years, who hath but *interesse termini*, is void, as if the lease be to begin *in futuro*, as at Michaelmas.

§ 460. In the same manner it is, as it seemeth, where a lease is made to a man to hold of the lessor at his will, by force of which lease the lessee hath possession: if the lessor in this case make a release to the lessee of all his right, &c. this release is good enough for the privity which is between them; for it shall be in vain to make an estate by a livery of seisin to another, where he hath possession of the same land by the lease of the same man before, &c.

But the contrary is holden, Pasch. 2 E. 4, by all the justices.

As before is shewed, that a release made by the lessor to his lessee for years is good, if the lessee be then in possession by virtue of the said lease; so now the author declareth his opinion, that a

(1) This appears to be the section referred to in the MS. though it is not very

clear for what purpose that section should be quoted.—Ed.

release made by the lessor to his lessee at will, who is thereof in possession, is good; and his reason is, because of the privity which is between them; for in vain it should be to make estate by livery and seisin unto him, when he hath possession of the same lands and tenements by lease from the same man before; *lex non præcipit inutilia, quia inutilis labor stultus*. 5 Co. 89. And according to Littleton's opinion in this case is 10 Eliz. in *Dyer*, fo. 269 b, although *contrarium tenetur per tous les justices*, P. 2 E. 4. fo. 6 b (1): and Brooke, abridging this case of 2 E. 4. tit. *Releases*, 48, saith, *ratio videtur eo que il poet entre et luy enfeoffer, contrarie sur termour, et hujusmodi que ad interest certaine*; but the law is taken as Littleton hath set it down.

§ 461. But where a man of his own head occupieth lands or tenements at the will of him which hath the freehold, and such occupier claimeth nothing but at will, &c. if he which hath the freehold will release all his right to the occupier, &c. this release is void, because there is no privity between them by the lease made to the occupier, nor by other manner, &c.

But here is put a diversity between tenant at will, who is put in by the consent and demise of the lessor, and tenant at sufferance who hath the lands only by his own act. You may see in section 70, that if a man do make a deed of feoffment to another of certain lands, and deliver unto him the deed, but no livery of seisin; in this case, he to whom the deed is made, may enter into the land, and hold and occupy at the will of him who made the deed; because it is proved by the words of the deed, that it is his will that the other shall have the land. But tenant at sufferance is, when lessee for years, or tenant *pur autre vie*, doth hold over his term, or estate, or when one doth enter into the land and frank-tenement of another, and nevertheless such an occupier doth not claim any thing but at will, &c. in which last case, if he which hath the frank-tenement will release all his right to the occupier, &c. such release

(1) Lord Coke observes in this case, "This is of a new edition, and the book here cited ill understood, for it is to be

understood of a tenant at sufferance." Co. Lit. 270 b.—Ed.

is void, because no privity is between them, by any lease made to the occupier, nor by any other manner; and according *see Keilw. 426, et Kitchin, fo. 238, 4H. 7. 3b*, where it is said, that tenant at sufferance may distrain for damage feasant, and may have a writ of trespass; but see *15H. 7. 2.* that he cannot avow for damage feasant in his own name (as tenant at will, or a commoner may), because he hath no interest, but only by his own act: also the trespass or wrong might so be punished.

§ 462. Also, if a man enfeoff other men of his land upon confidence and to the intent to perform his last will, and the feoffor occupieth the same land at the will of his feoffees, and after the feoffees release by their deed to their feoffor all their right, &c. this hath been a question, if such release be good or no. And some have said, that such release is void, because there was no privity between the feoffees and their feoffor, in so much as no lease was made after such feoffment by the feoffees to the feoffor, to hold at their will: and some have said the contrary, and that for two causes.

§ 463. One is, that when such feoffment is made upon confidence to perform the will of the feoffor, it shall be intended by the law, that the feoffor ought presently to occupy the land at the will of his feoffees; and so there is the like kind of privity between them, as if a man make a feoffment to others, and they immediately upon the feoffment will and grant, that their feoffor shall occupy the land at their will, &c.

§ 464. Another cause they allege, that if such land be worth forty shillings a year, &c. then such feoffor shall be sworn in assise and other inquests in pleas reals, and also in pleas personals, of what great sum soever the plaintiff will declare, &c. And this is by the common law of the land: *Ergo*, this is for a great cause. And the cause is, for that the law will that such feoffors and their heirs ought to occupy, &c. and take and enjoy all manner of profits, issues, and revenues, &c. as if the lands were their own, without interruption of the feoffees, notwithstanding such feoffment. *Ergo*, the same law giveth a privity between such feoffors and the feoffees

upon confidence, &c. for which causes they have said, that such releases made by such feoffees upon confidence to their feoffor or to his heirs, &c. so occupying the lands, shall be good enough: and this is the better opinion, as it seemeth.

*Quære*, for this seemeth no law at this day.

In these three sections the author doth propound a cause of uses; for in the time when Littleton did make this book, viz. in the reign of King Edward 4. (*vide Coke's Preface to his 10th part, fo. 9.*) uses were much in use and practice in most men's conveyances of lands, as it is to be read in *Chudleigh's case*, in 1 Co.: and because this case was then doubtful, whether *cestui que use* after such feoffment were as a tenant at will unto his feoffees, so that a lease might enure to him, or but as a tenant at sufferance, the author doth argue it *pro et contra*, as you see; and in the end seemeth to approve their opinions, as they say, he is tenant at will to his feoffees; but in the *quære* put next ensuing by the report, it is said, that the law is otherwise at this day. And it is no marvel, though Littleton in some cases did mistake the law, as before, sect. 116 (1); for *omnia habere in memoriâ, et in nullo errare divinitatis potius est quam humanitatis*. Bracton. But in *Coke's Preface to his 10th book*, it is affirmed and maintained against all opposites whatsoever, that this book is a work of as absolute perfection in his kind, and as free from error as any book written of any human learning; but at this day this doubt is out of all doubt or question; for by the statute made 27 H. 8. cap. 10, the land doth follow the use, as the shadow doth follow the body; so that if now a man do make a feoffment to his use, or to the use of his last will, the feoffee is now neither tenant at will, nor tenant at sufferance, but seised in demesse as before, and according to such use, intent, and purposes, as in the deed of feoffment are expressed. *Vide 6 Co. 18 a.* And it hath been adjudged, that the fee simple of a copyhold, being limited upon surrender unto the use of his last will, doth remain in the copyholder, not in the lord; 4 Co. 23 a. according to Littleton, in this sect. 463, when a man doth make a feoffment to the use of his last will, he hath the use in the mean time. 6 Co. 18 a.

(1) Lord Coke says, "The latter opinion is the better, being Littleton's own opinion." Co. Lit. 221 a.—Ed.

§ 465. Also, releases according to the matter in fact, sometimes have their effect by force to enlarge the estate of him to whom the release is made. As if I let certain land to one for term of years, by force whereof he is in possession, and after I release to him all the right which I have in the land without putting more words in the deed, and deliver to him the deed, then hath he an estate but for term of his life. And the reason is, for that when the reversion or remainder is in a man who will by his release enlarge the estate of the tenant, &c. he shall have no greater estate, but in such manner and form as if such lessor were seised in fee, and by his deed will make an estate to one in a certain form, and deliver to him seisin by force of the same deed: if in such deed or feoffment there be not any word of inheritance, then he hath but an estate for life; and so it is in such releases made by those in the reversion or in the remainder. For if I let land to a man for term of his life, and after I release to him all my right without more saying in the release, his estate is not enlarged. \*But if I release to him and to his heirs, then he hath a fee simple; and if I release to him and to his heirs of his body begotten, then he hath a fee tail, &c. And so it behoveth to specify in the deed what estate he to whom the release is made shall have.

*Cujus est dare ejus est disponere*, is a rule in this case: *Vide sect. 468, 469*: And yet observe, that in this first section the former estate for years which is but a chattel, is transubstantiated into a freehold, for his own life, by the operation of law for convenience. But if tenant in tail do make a lease for years, and after do release to his lessee all the right which he hath in the same land, "to have and to hold to their lessee and his heirs," yet no greater estate doth pass by such a release, but only for the life of tenant in tail. *Plowd. 556 a. Vide sect. 306.*

§ 466. Also, sometimes releases shall enure *de mitter* and vest the right of him which makes the release to him to whom the release is made. As if a man be disseised, and he releaseth to his disseisor



all his right, in this case the disseisor hath his right, so as where before his estate was wrongful, now by this release it is made lawful and right.

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This section doth put the difference between the section 465, and this.

§ 467. But here note, that when a man is seised in fee simple of any lands or tenements, and another will release to him all the right which he hath in the same tenements, he needeth not to speak of the heirs of him to whom the release is made, for that he hath a fee simple at the time of the release made. For if the release was made to him for a day, or an hour, this shall be as strong to him in law, as if he had released to him and his heirs. For when his right was once gone from him by his release without any condition, &c. to him that hath the fee simple, it is gone for ever.

*Nota*, when a man is seised in fee simple of any lands or tenements, and another will release to him all the right which he hath in the same tenements, he needeth not to speak of the heirs of him to whom the release is made, because he had fee simple at the time of the release; *nota* upon this point *Dyer*, 263 *a*, *b*: for a disseisor doth gain an estate in fee: *Vide 6 Co.* 25 *a*: for if a release be made to him for a day or an hour, this shall be as strong to him in law as if he had released to him and to his heirs. *Vide 21 II.* 7. 23 *b*. For when his right is once gone from him by his release, without any condition, &c. to him who hath the fee simple, it is gone for ever. *Vide sect.* 520. And here doth appear the author's opinion, that the release, which the disseisee doth make to the disseisor, doth not so go by way of extinguishment, but that it may be restrained by annexing a condition to the said deed of release: and so is *Perk. fo.* 139, and *2 Co. fo.* 74 *a*, and other books there cited: and *4 Co.* 9 *b*, contrary to the opinion of Fineux, Chief Justice, in *Keilw.* 88. *pl.* 2, and *pl.* 8.

§ 468. But where a man hath a reversion in fee simple, or a remainder in fee simple, at the time of the release made, there if he

will release to the tenant for years, or for life, or to the tenant in tail, he ought to determine the estate, which he to whom the release is made shall have by force of the same release, for that such release shall enure to enlarge the estate of him to whom the release is made.

Vide ante, sect. 465.

§ 469. But otherwise it is, where a man hath but a right to the land, and hath nothing in the reversion nor in the remainder in deed. For if such a man release all his right to one which is tenant in the freehold, all his right is gone, albeit no mention be made of the heirs of him to whom the release is made. For if I let lands to one for term of his life, if I after release to him to enlarge his estate, it behoveth that I release to him and to his heirs of his body engendered, or to him and his heirs, or by these words, "to have and to hold to him and to his heirs of his body engendered," or, "to the heirs males of his body engendered," or such like estates, or otherwise he hath no greater estate than he had before.

Vide sect. 467, according. Et vide sect. 307.

§ 470. But if my tenant for life letteth the same land over to another for term of the life of his lessee, the remainder to another in fee, now if I release to him to whom my tenant made a lease for term of life, I shall be barred for ever, albeit that no mention be made of his heirs, for that at the time of the release made I had no reversion, but only a right to have the reversion. For by such a release, and the remainder over, which my tenant made in this case, my reversion was discontinued, &c. and this release shall enure to him in the remainder, to have advantage of it, as well as to the tenant for term of life.

And upon the form of the words in the registering of this case, it hath been collected, that if tenant for term of life do let for life, without saying for whose life, it shall be understood for the life of the lessor, for that he might lawfully do: but if it shall be construed for the life of the grantee, then it shall be a forfeiture of his estate; for the law will restrain general words or act, rather than any mischief or inconvenience should ensue thereby. *Vide inde Finch, li. 1. fo. 15 a.* But if tenant in tail do make a lease for life, this shall be intended for the life of the lessee. *Finch, ibid. b. Littleton, sect. 630.*

§ 471. For to this intent the tenant for term of life, and he in the remainder are as one tenant in law, and are as if one tenant were sole seised in his demesne as of fee at the time of such release made unto him, &c.

And agreable to this is 50 E. 3. fo. 22. And if there be lord and tenant, and the tenant do alien in mortmain, the grantee for life of the seignory, and he in the remainder, shall have but one year to enter; and if a rent were reserved, it shall extend as well unto the remainder as unto the estate for life. Also, if tenant for years or guardian do alien for life, the remainder over in fee, he in the remainder who doth enter after the death of the tenant for term of life, is a disseisor, as well as the lessee for life; for all is but one estate in law. *Vide librum, et Bro. tit. Entry congeable, 17.* And if tenant for life be [the remainder for life], the remainder in fee, the first tenant for life levies a fine at the common law, if the two tenants for life will not make claim within the year, he in the reversion or the remainder was bound; for they all might have but one year after the fine levied. *Plowd. 359 a, nota librum.*

§ 472. Also, if a man be disseised by two, if he release to one of them, he shall hold his companion out of the land, and by such release he shall have the sole possession and estate in the land. But if a disseisor enfeoff two in fee, and the disseisee release to one of the feoffees, this shall enure to both the feoffees, and the cause of the diversity between these two cases is pregnant enough. For that they come in by feoffment, and the others by wrong, &c.

And the cause of the diversity between these two cases is apparent; because in the first case his title and entry was wrongful, and in the other by lawful feoffment; and according is in *Keilw.* 12 H. 7. fo. 1 a, in fine. Vide sect. 306, 307. 11 H. 7. 12 a.

§ 473. Also, if I be disseised, and my disseisor is disseised, if I release to the disseisor of my disseisor, I shall not have an assise nor enter upon the disseisor, because his disseisor hath my right by my release, &c. And so it seemeth in this case, if there be twenty disseised one after another, and I release to the last disseisor, this disseisor shall bar all the others of their actions and their titles. And the cause is as it seemeth, for that in many cases, when a man hath lawful title of entry, although he doth not enter, he shall defeat all mean titles by his release, &c. But this holds not in every case, as shall be said hereafter.

Vide 9 H. 7. 25 b.

§ 474. Also, if my disseisor letteth the tenements whereof he disseised me, to another for term of life, and after the tenant for term of life alieneth in fee, and I release to the alienee, &c. then my disseisor cannot enter, *causâ quâ suprâ*, albeit that at one time the alienation was to his disinheritance, &c.

Vide Dyer, 339 a.

§ 475. Also, if a man be disseised, who hath a son within age, and dieth, and the son being within age, the disseisor dieth seised, and the land descend to his heir, and a stranger abate, and after the son of the disseisee, when he cometh to his full age, releaseth all his right to the abator; in this case the heir of the disseisor shall not have an assise of *mort d'ancestor* against the abator; but

shall be barred, because the abator hath the right of the son of the disseisee by his release, and the entry of the son was congeable, for that he was within age at the time of the descent, &c.

This case also is an affirmation of the rule before.

§ 476. But if a man be disseised, and the disseisor maketh a feoffment upon condition, viz. to render to him a certain rent, and for default of payment a re-entry, &c. if the disseisee release to the feoffee upon condition, yet this shall not amend the estate of the feoffee upon condition; for notwithstanding such release, yet his estate is upon condition, as it was before.

And with this agreeth the opinion of all the justices, Pasch. 9 H. 7.

Now the author doth put certain cases of exception to his conclusion made in the section 473, that the rule there put doth not hold in every case: as for example, if a man be disseised, and the disseisor maketh a feoffment upon condition, that is to say, to render to him a certain rent, and for default of payment a re-entry, &c. if the disseisee do release to the feoffee of the disseisor [yet this shall not amend the estate of the feoffee] so being upon condition; for notwithstanding the release, yet his estate is upon condition as it was before, 9 H. 7. 25 *b*, according. And yet *nota*, by the release all the right is gone from the disseisee, and therefore if the feoffee do afterwards break the condition, the benefit of such release made to such feoffee shall enure and be to the disseisor: as in 2 Co. 56 *a*. if the disseisee do levy a fine to a stranger, in this case the disseisor shall retain the lands for ever; for the disseisee against his fine cannot claim the land, and the cognizee cannot enter; for the right which the cognizor had cannot be transferred unto him; but by fine the right is extinct, whereof the disseisor shall take advantage. *Vide* 6 Co. 70 *a*.

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§ 477. In the same manner it is, where a man is disseised of certain lands, and the disseisor grant a rent-charge out of the same land, &c. albeit the disseisee doth afterwards release to the disseisor, &c. yet the rent-charge remains in force. And the reason in these two cases is this, that a man shall not have advantage by such release which shall be against his proper acceptance, and against his own grant. And albeit some have said, that where the entry of a man is congeable upon a tenant, if he releases to the same tenant, that this shall avail the tenant, as if he had entered upon the tenant, and after enfeoffed him, &c. this is not true in every case. For in the first case of these two cases aforesaid, if the disseisee had entered upon the feoffee upon condition, and after enfeoffed him, then is the condition wholly defeated and avoided. And so in the second case, if the disseisee entereth and enfeoffeth him who granted the rent-charge, then is the rent-charge taken away and avoided, but it is not void by any such release without entry made, &c. (1).

§ 478. Also, if a man be disseised by an infant who alien in fee, and the alienee dieth seised, and his heir entereth, the disseisor being within age, now is it in the election of the disseisor to have a writ of *dum fuit infra ætatem*, or a writ of right against the heir of the alienee, and which writ of them he shall choose, he ought to recover by the law, &c. And also he may enter into the land without any recovery, and in this case the entry of the disseisee is taken

(1) Disseisor graunt un rent pur terme de vic, et fait lease pur vic, et puis graunt le reversion al disseisee, et il accept le rent [del lessee], il ne pœt avoïder le lease. 28 H. 8. 30 b. Et lege case, H. 8. done manor al dame Marie sa fille, quamdiu el seroit unmarried, par le mort E. 6. le reversion descendra a le dame Marie, qui avoit graunté un rent-charge hors del dit manor, et el avoit le reversion, et puis el maria le roi [qui ore est], sil accordera le rent-charge. 3 & 4 P. & M. 141 a.—*Note in MS.* The above cases are quoted from Dyer; the MS. is so unintelligible,

that I have been forced to insert and alter several words, as well as an imperfect acquaintance with our old law French would permit; there would have been no difficulty, had the *votes* been copied *verbatim* from the report, but unfortunately the annotator has abridged the cases, and made use of his own language. In the latter case, it will be found, that in Dyer, the grant is reported to have proceeded from Edward the Sixth, the brother of Mary, and not from her father, Henry the Eighth.—*Ed.*

away, &c. But in this case if the disseisee release his right to the heir of the alienee, and after the disseisor bringeth a writ of right against the heir of the alienee, and he join the mise upon the mere right, &c. the great assise ought to find by the law, that the tenant hath more mere right than the disseisor, &c. for that the tenant hath the right of the disseisee by his release, the which is the most ancient and most mere right; for by such release all the right of the disseisee passeth to the tenant, and is in the tenant. And to this some have said, that in this case where a man which hath right to lands or tenements (but his entry is not congeable) if he release to the tenant all his right, &c. that such release shall enure by way of extinguishment. As to this it may be said, that this is true as to him which releaseth; for by his release he hath dismissed himself quite of his right as to his person, but yet the right which he hath may well pass to the tenant by his release. For it should be inconvenient that such an ancient right should be extinct altogether, &c. for it is commonly said, that a right cannot die.

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In the beginning of this section is shewed the favor and protection of the law to infants, that is, until they be of full age of twenty-one years, as before, sect. 101. *Vide Doct. & Stu. lib. 1. cap. 21.* First, it is here said, that an infant may avoid his own feoffment, which is to be understood as well when he made it in person, as when his feoffment was made by letter of attorney. 4 Co. 125 a. And the means given to him by the law are three; first by entry, which he may do whilst he is yet within age, although the said land after such feoffment made by him did descend to the heir of the feoffee, (as before is taught, sect. 402); secondly, he may avoid his feoffment by writ of *dum fuit infra ætatem*, of which writ read *F. N. B.* 102, where it appeareth, he cannot have or maintain his writ till he be of full age of twenty-one years; for the words of the writ do suppose so much, viz. *dum fuit infra ætatem*, by which it appeareth, that he is not within age at the time of the writ brought; and also the writ saith, *qui plenæ ætatis est, ut dicitur*, by which it appeareth that he must be of full age, when he doth bring this writ. And this third remedy by writ of right, he may

have during his nonage if he will, and the tenant cannot delay him by praying that the parol may demur, till the demandant be of full age, as this case is; for it is to be observed, that every action real is possessory, that is to say, of his own possession, and seisin; or ancestrel, that is, of the seisin or possession of his ancestors: and generally in all real actions, which an infant doth bring of his own possession, the plea shall not be deferred for his nonage; but by presumption of law, the granting that the parol shall demur for the nonage of the demandant in other cases, is in favor and for the benefit of the infant, least, for want of good intelligence of his estate, and of the truth of the matter, he should be prejudiced of his right, which doth descend unto him. But as in this case it should be a prejudice to the infant, if he should lose his possession which he had, and be delayed thereof till his full age. *6 Co. fo. 3 b, et Dyer, 136 b.* Also in this it is shewed, that although the estate which the infant claimeth to have, is but by disseisin, yet he may have a writ of right against any other that claimeth estate by or under him, though he be in by descent from his father or other ancestor during his minority, for *qui prior est tempore potior est jure*, as it is said in *4 Co. 9 a.*

But in this case if the disseisee do release his right to the heir of the alienee, and after the infant who made the disseisin, do bring a writ of right against the heir of the alienee, and he joineth the mise or issue upon the mere right, &c. the great assise ought by the law to find and give their verdict, that the tenant hath more mere and clear right than the infant disseisor hath; because the tenant hath the right of the disseisee by this release, which is more ancient and more mere right than the right of the disseisor; for by that release, all the right of the disseisee doth pass to the tenant, and is in the tenant; for the easy understanding whereof must be remembered that which before is taught (sect. 234) concerning the signification of this word "assise;" where also mention is made of the grand or *magna assisa* in a writ of right, which writ is the highest in the laws for a trial of titles touching the land, and is final, and the jury is called the great assise; for of them there must be sixteen not twelve only, as in other juries. *Dyer, 98 a, and Finch, lib. 3. 88 a.* And the tenant hath the election to have the matter tried either by the great assise or by battle, if he will. *Vide sect. 489.* But in this case of a writ of right, the battle shall ever be by champions; and this is the reason that in a writ of right, the



infant may join the mise, and try it by battle, and so he cannot in appeal; for then the battle shall be in proper person. *Ibid.*

§ 479. But releases which enure by way of extinguishment against all persons, are where he to whom the release is made, cannot have that which to him is released. As if there be lord and tenant, and the lord release to the tenant all the right which he hath in the seignory, or all the right which he hath in the land, &c. this release goeth by way of extinguishment against all persons, because that the tenant cannot have service to receive of himself.

§ 480. In the same manner is it of a release made to the tenant of the land of a rent-charge or common of pasture, because the tenant cannot have that which to him is released, &c. so such releases shall enure by way of extinguishment in all ways.

It is well observed by Sir John Davies, fo. 46, that estates in land and right in land, be things of such substance, that they cannot be extinct or *interire penitus*. But a release that goeth by way of extinguishment against all persons is, where he to whom the release is made, cannot have that which is released to him; for these two last sections are of things which issue out of land, and therefore are subject to extinguishment to all intents. For if the lord do grant his seignory unto the tenant and to a stranger, there shall be no joint-tenancy, or survivor between them; for the moiety of the seignory is extinct to all intents and purposes. *Plowd. Com. 419 a. Vide Sir John Davies, fo. 5.*

§ 481. Also, to prove that the grand assise ought to pass for the demandant, in the case aforesaid, I have often heard the reading of the statute of Westm. 2, which begun thus: *In casu quo vir amiserit per defaultam tñementum quod fuit jus uxoris suæ, &c.* that at the common law before the said statute, if a lease were made to a man for term of life, the remainder over in fee, and a stranger by feigned action recovered against the tenant for life by default, and

after the tenant dieth, he in the remainder had no remedy before the statute, because he had not any possession of the land.

§ 482. But if he in the remainder had entered upon the tenant for life, and disseised him, and after the tenant enter upon him, and after the tenant for life by such recovery lose by default and die, now he in the remainder may well have a writ of right against him which recovers, because the mise shall be joined only upon the mere right, &c. Yet in this case the seisin of him in the remainder was defeated by the entry of the tenant for life. But peradventure some will argue and say, that he shall not have a writ of right in this case, for that when the mise is joined, it is joined in this manner, (*scilicet*) if the tenant hath more mere right in the land in the manner as he holdeth, than the demandant hath in the manner as he demandeth, and for that the seisin of the demandant was defeated by the entry of the tenant for term of life, &c. then he hath no right in the manner as he demandeth.

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*Item*, to prove that the great assise ought to pass for the tenant (for this word "demandant" (1) is misprinted as it seemeth to me) in the case aforesaid, (*vide* sect. 478) I have heard often the lecture upon the statute of Westminster 2. cap. 3, that at the common law before that statute, if a lease were made to a tenant (2) for term of life, the remainder over in fee, and a stranger by a feigned action had recovered against the tenant for term of life by default, and after the tenant had died, he in the remainder had not any remedy before that statute, because he had no possession of the

(1) It is a matter of surprise, that this error, which is retained in almost all the numerous editions of Littleton, should have escaped the notice of Lord Coke and other learned annotators. I have examined almost every edition of the Tenures that I have been able to meet with, and at length have found two copies in which the remark of our commentator is borne out. The one is a folio edition, by Robert Redman, without date, a copy of which is in the British Museum, and

which formerly belonged to Mr. Hargrave: in this the original reading is "tenant;" the other, also in the British Museum, and belonging to Mr. H. is Pynton's folio edition of 1516; in this copy it is printed "demandant," but that word is erased, and "tenant" written over.—*Ed.*

(2) In the L. and M. and Roh. editions of Littleton, *al tenant* is put in the place of *a une home*.

land. And in 4 *Co. fo. 9 a*, it is said, that the seisin requisite in a writ of right of lands, must be actual, and not seisin in law. And the reason of the common law is said in *Plowd. Com. 43 b*, to be, for the presumption which the law had of the truth of the title, and of the cause of such recovery; and in 6 *Co. fo. 8 b*, that the reason of the strictness of the common law in such case was, to take away the multiplicity and infiniteness of suits, trials, recoveries, and judgments, in one and the same cause; and therefore in the judgment and policy of the law it was thought more profitable to the commonwealth, and more for the honor of the law to leave some without remedy (as is aforesaid), and to put others to their writ of right, without any respect of coverture, &c. than that there should be no end of actions and suits.

And by the way it is to be observed, that at the common law there was a writ of *cui in vita*, in case only of a discontinuance made by the husband [in which the demise of the husband] is supposed by the writ: *Dyer, 83 b*: of which writ vide *Fitz. N. B. 193*. And although this statute of Westm. 2. cap. 3, in *casu quo vir amiserit per defaultam tenementum quod fuit jus uxoris sue, durum fuit quod uxor post mortem viri non habuit aliud recuperare quam per breve de recto*, &c. so that the statute doth speak where the husband doth lose, &c.; in which case, if the husband sole had [lost] by default, the law ever was, that the wife might enter, and was not driven to a writ of right, but the exposition of the statute is, where the husband and the wife do lose by default; for so is the intent of the statute. *Plowd. Com. 57 b*.

§ 483. To this it may be said, that these words (*modo et forma prout, &c.*) in many cases are words of form of pleading, and not words of substance. For if a man bring a writ of entry in *casu proviso*, of the alienation made by the tenant in dower to his disinherittance, and counteth of the alienation made in fee, and the tenant saith, that he did not alien in manner as the demandant hath declared, and upon this they are at issue, and it is found by verdict that the tenant aliened in tail, or for term of another man's life, the demandant shall recover; yet the alienation was not in manner as the demandant hath declared, &c.

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It is a rule in divers cases, *factum non dicitur quod non perseverat*, as you may see in 5 Co. pt. 2. fo. 2 b, and fo. 9 b, nevertheless in this case Littleton saith, *ut sequitur*; that these words *modo et formâ prout*, &c. in many cases be words of form of pleading, and not words of substance. For if a man bring a writ of entry in *casu proviso*, of alienation made by the tenant in dower to his disheritance, and counteth of alienation made in fee, and the tenant saith, that he aliened not in the manner that the demandant hath declared, and upon this they be at issue, and it is found by verdict, that the tenant did alien in tail, or for term of another's life, the demandant shall recover; and yet the alienation was not in the manner that the demandant hath declared. And of this matter, where *modo et formâ* is material, and where [not], *vide John Kitchin's collection of cases touching this matter*, fo. 232. And this writ of entry in *casu proviso* was given by the statute of Gloucester, cap. 7, which read, and also read *F. N. B. 205 b.*

§ 484. Also, if there be lord and tenant, and the tenant hold of the lord by fealty only, and the lord distrain the tenant for rent, and the tenant bringeth a writ of trespass against his lord for his cattle so taken, and the lord plead that the tenant holds of him by fealty and certain rent, and for the rent behind he came to distrain, &c. and demand judgment of the writ brought against him, *quare vi et armis*, &c. and the other saith that he doth not hold of him in the manner as he suppose, and upon this they are at issue, and it is found by verdict that he holdeth of him by fealty only; in this case the writ shall abate, and yet he doth not hold of him in the manner as the lord hath said. For the matter of the issue is, whether the tenant holdeth of him or no; for if he holdeth of him, although that the lord distrain the tenant for other services which he ought not to have, yet such writ of trespass *quare vi et armis*, &c. doth not lie against the lord, but shall abate.

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And the causes wherefore the tenant shall not have action of trespass *vi et armis* against his lord for his wrongful distress, where nothing is behind, is, for that it is prohibited by the statute of Marl-

bridge, cap. 3, *non ideo puniatur dominus per redemptionem*. Vide 5 H. 7. fo. 10 a, et seq. 4 Co. 11 b, and in Keilway, fo. 31, and in 9 Co. 76 a. If the lord distrain the cattle of his tenant, though nothing is behind, the tenant, for the reverence and duty which is due to the lord, shall not have an action of trespass *quare vi et armis* against him; but if the lord do command his servant or bailiff in such a case to distrain where nothing is behind, the tenant may have an action of trespass *vi et armis* against the bailiff or servant.

§ 485. Also, in a writ of trespass for battery, or for goods carried away, if the defendant plead not guilty, in manner as the plaintiff suppose, and it is found that the defendant is guilty in another town, or at another day than the plaintiff suppose, [so it be within the same county; vide *Theoloall. lib. 7. cap. 4. fo. 114 a (1)*], yet he shall recover. And so in many other cases these words, *scil.* in manner as the demandant or the plaintiff hath supposed, do not make any matter of substance of the issue: for in a writ of right, where the mise is joined upon the mere right, that is as much as to say, and to such effect, viz. whether the tenant or demandant hath more mere right to the thing in demand.

And see more of this matter, in *Kitchin, fo. 232*.

§ 486. Also, if a man be disseised, and the disseisor dieth seised, &c. and his son and heir is in by descent, and the disseisee enter upon the heir of the disseisor, which entry is a disseisin, &c. if the heir bring an assise, or a writ of entry in nature of an assise, he shall recover.

Vide sect. 385. And the reason wherefore the heir of the disseisor may maintain an assise is, because the entry and disseisin by

(1) In the MS. the whole section of Littleton is written *verbatim*, and these words inserted: a reprint of the text of Littleton seemed useless.—Ed.

the disseisee was made unto himself the demandant, and he may have against the disseisee, who now is a disseisor, a writ of entry in the nature of an assise; which writ is called *brief de quibus*, which is in *F. N. B.* [fo. 191.]

§ 487. But if the heir bring a writ of right against the disseisee, he shall be barred, for that when the grand assise is sworn, their oath is upon the mere right, and not upon the possession. For if the heir of the disseisor sue an assise of *novel disseisin*, or a writ of *entrie* in nature of an assise, and recovers against the disseisee, and sueth execution, yet may the disseisee have a writ of *entrie* in the *per* against him, for the disseisin made to him by his father, or he may have against the heir a writ of right.

But if the heir do bring a writ of right against the disseisor, he shall be barred, because when the great assise is sworn, their oath is upon the mere right, and not upon the possession. But if the heir of the disseisor, who was in by lawful descent, had brought an assise of *novel disseisin*, or a writ of *entry* in the nature of an assise, and recovered against the disseisee, and sued execution, yet may the disseisee have a writ of *entry* in the *per* against him of the disseisin made to him by the father of the heir, or he may have a writ of right against the heir at his election to recover his right by way of action, although his *entry* was taken away by the descent unto the heir, and of the form of the writ of entry in the *per*, *vide F. N. B. ubi supra*.

§ 488. But if the heir ought to recover against the disseisee in the case aforesaid by a writ of right, then all his right should be clearly taken away, for that judgment final shall be given against him, which should be against reason, where the disseisee hath the more mere right.

§ 489. And know (my son) that in a writ of right, after the four knights have chosen the grand assise, then he hath no greater delay than in a writ of *formedon*, after the parties be at issue, &c. And if the mise be joined upon battle, then he hath lesser delay.

Read as it is in the book, and known, that the tenant in a writ of right may make his election, whether the trial shall be by battle (*scil.*) by champions for them, or by the great assise. If the suit be in the Common Place, a writ judicial shall issue to the sheriff to summon four knights to make return of the gréat assise, so the sheriff is in that case excluded: the form thereof you may see in *Fitz. N. B. fo. 4, et in Finch, 88 a. Vide in Dyer, 98 a.*

§ 490. Also, a release of all the right, &c. in some case is good, made to him which is supposed tenant in law, albeit he hath nothing in the tenements. As in a *præcipe quòd reddat*, if the tenant alien the land hanging the writ, and after the demandant releaseth to him all his right, &c. this release is good, for that he is supposed to be tenant by the suit of the demandant, and yet he hath nothing in the land at the time of the release made.

*Vide 10 Co. [48.] according*, in respect of the privity; and in *Manxell's case*, in *Plowd. 11 b.* because, saith he, the demandant is stopped to say, that the tenant is not his tenant, whom by his writ he hath so affirmed to be; for he must continue tenant respectively as unto him pending the writ, notwithstanding his alienation. And *nota*, original writs are not in law depending, before they be returned in that court, which thereof doth hold plea, whether it be the King's Bench, Common Place, or the Chancery; for till the return the suit is not said pendant, neither may the court hold plea, but on an original returned before them. *Finch, li. 3. fo. 53 a. And see 21 E. 4. 55 a*, where it is said, a writ is attained so soon as it is sealed, but it is not pendant till it be returned. *Vide 18 H. 5, according; and in Manxell's case, Plowd. 10.* And *nota inde*, 5 Co. 47 b, where an original writ is purchased out of the Chancery, returnable in the Common Bank, or in the King's Bench, in such case, after that the writ shall be returned, the writ shall be said pendant from the day of the *teste* thereof; and if the tenant do alien before the return, and after the *teste*, it shall be said an alienation hanging the writ. In that book, note a diversity between these cases of original writs purchased out of the Chancery, and returnable into other courts, and a bill exhibited in the Star Chamber, whether the process do issue out of the same court, and are returnable in the same court;

and therefore there shall be said depending before the return thereof, or serving of the *subpœna*; for the bill *est origo rei et caput sectæ, et res denominatur a principaliori parte*.

§ 491. In the same manner it is in a *præcipe quòd reddat* the tenant vouch, and the vouchee enters into warranty, if afterward the demandant release to the vouchee all his right, this is good enough, for that the vouchee, after that he hath entered into warranty, is tenant in law to the demandant, &c.

*Nota* the reason alleged in this case, because the vouchee, after he hath entered into the warranty, is tenant to the demandant. *Vide* 5 H. 7. 39 a, b. 7 E. 4. 23 a. 33 H. 8. 40. 12 H. 6. fo. 6. 8 H. 4. 5 a. *Nota* this case and the next precedent case are of the number of those things, which in the law are imagined, and are but fictions of the law. 3 Co. 29 b. And *nota* in a *præcipe*, if one be vouched, now having regard to the demandant, the vouchee is tenant, and a release to him is good; but having a regard to strangers, he is not tenant, and a release to him by a stranger is void (1). 1 Co. 87 b, But he that doth come in as vouchee, shall be in to all purposes. as he was when he had the land, and when he cometh in by the warranty; he is in like plight as if he were tenant of his first estate, and as if the *præcipe* had been brought against him immediately, which *nota* in *F'lowd. Manxell's case*, 7 b.

§ 492. Also, as to releases of actions reals and personals, it is thus: Some actions are mixed in the realty and in the personalty: as an action of waste sued against tenant for life; this action is in the realty, because the place wasted shall be recovered; and also in the personalty, because treble damages shall be recovered for the wrongful waste done by the tenant (2); and therefore in this action a release of actions reals is a good plea in bar, and so is a release of actions personals.

(1) See Co. Lit. 284 b.—Ed.

(2) "For so is the statute of Gloucester, cap. 5:" as in former occasions, the

section of Littleton is transcribed, and this remark inserted.—Ed.



§ 493. And in a *quare impedit* a release of actions personals is a good plea, and so is a release of actions reals, *per Martin, quod fuit concessum*. Hil. 9 H. 6. fol. 57.

§ 494. In the same manner it is in an assise of *novel disseisin*, for that it is mixed in the realty and in the personalty. But if such an assise be arraigned against the disseisor and the tenant, the disseisor may well plead a release of actions personals to bar the assise, but not a release of actions reals, for none shall plead a release of actions reals in an assise but the tenant.

And agreeable to this is 7 Co. 26a, where it is said, that by the order of the common law, every one shall plead that plea which is apt for him, and pertinent to his case; as in assise against the disseisor and tenant, &c. the tenant shall plead a plea which doth concern the tenancy, and not the disseisor; and in a *quare impedit*, the incumbent shall not plead to the right of the patronage in which he hath nothing, to this the patron shall plead.

§ 495. Also, in such actions reals which ought to be sued against the tenant of the freehold, if the tenant hath a release of actions reals from the demandant made unto him before the writ purchased, and he plead this, it is a good plea for the demandant to say, that he which pleads the plea had nothing in the freehold at the time of the release made, for then he had no cause to have an action real against him.

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Releases of land which demand freehold in demesne do not lie but only against the tenant of freehold in *fact*, or in law; and the *præcipe quòd reddat* doth not lie against the termor, but in one special case, for *nemo potest plus juris in alium transferre quam ipse habet*. 6 Co. 57a. And therefore a release of actions real is no plea, except he be tenant of the freehold at the time of the release; for otherwise he had no cause of such action against him. *Nota* the saying of Coke, Justice, that the opinion in 14 H. 6. fo. 11, was of great difficulty (*scil.*) that if one do release to him in the reversion expectant upon an estate for life all actions real, and after

the tenant for life is impleaded, and doth pray in aid of him in the reversion, or vouch him, or if he received, in these cases (as there it is said) Although the *præcipe* was [not] commenced against him, yet for so much as by the receipt or voucher he is become tenant to the *præcipe* of him who made the release, and shall be bound by the judgment, he shall have advantage to plead the release of all actions real. But the doubt is, because at the time of the release made he had no cause, as Littleton saith, to have any action against him; but without question, after receipt or entry into the warranty of the vouchee, a release by the demandant to the tenant by receipt, or to the vouchee, is good; because both the one and the other, at the time of the release made, was tenant in law unto the demandant; but a release unto them by any stranger is not good. 8 Co. 151 b. The foundation and ground-work of all common recoveries to dock estates tail is, to be certain that the writ of entry in the post be brought against a tenant of freehold; and thereof see the manner and usual course of such cases in 10 Co. fo. 45 b. *et nota bene.*

§ 496. Also, in such case where a man may enter into lands or tenements, and also may have an action real for this, which is given by the law against the tenant; if in this case the demandant releaseth to the tenant all manner of actions reals, yet this shall not take the demandant from his entry, but the demandant may well enter notwithstanding such release, for that nothing is released but the action, &c.

Therefore it is said in 8 Co. 151 b. *et* 152 a. if the disseisee release unto the disseisor, *omnes actiones (scil.) jus recuperandi, sive prosequendi in judicio*, by this his right of entry is not released: for when a man hath divers means to come to his right, he may release one of them especially, and yet take the benefit of the other (1); and with this doth accord divers books there recited. *Vide* 21 H. 7. 23 b. But when a man hath no other means to come to the land, but by way of action, there if he release all actions, by it inclusive

(1) See Co. Lit. 268 b.—*Ed.*

his right of judgment (1) is gone, because by his own act he hath barred himself of all means and remedies to recover or attain to it: and therefore if the disseisee release all actions to the heir of the disseisor, by this all his right is gone by judgment of law. *Vide librum: et vide in 10 Co. 41 b. according:* and there it is said, *Paroles font plea. See in Dyer, 57 a.* A man did covenant by indenture, and also is bound by obligation, to perform all the covenants in the indenture, the obligee doth release all the covenants in the indenture, yet the obligation is not released. *Dyer, 57 a, b.*

§ 497. In the same manner it is of things personal: as if a man by wrong take away my goods, if I release to him all actions personals, yet I may by the law take my goods out of his possession.

§ 498. Also, if I have any cause to have a writ of detinue of my goods against another, albeit that I release to him all actions personals, yet I may by the law take my goods out of his possession, because no right of the goods is released to him, but only the action, &c.

*Coke's 4th part, 63a. according;* where you may read the opinion of Sir Christopher Wray, Chief Justice, and Sir Roger Manwood, Chief Baron, in a case between Moyle Fynch, Esquire, and the Lady Fynch, resolved by the release of these cases. But because they did mistake the law in that case of Lady Fynch, therefore I omit to write it at large, and do refer you to full satisfaction in that case to sect. 352. and these two cases of Littleton are vouched in 11 Co. 82b. and divers other books according to Littleton. For by release of actions the right or interest is not released; but if in such case I do release all demands, such a release shall not only exclude me of my action, but also of my entry and seisin, and of my right in my land, and also my property in my chattels.

§ 499. Also, if a man be disseised, and the disseisor maketh a feoffment to divers persons to his use, and the disseisor continually

(1) It stands thus in the MS. In the English translation of the Reports it is thus, "if he releases all actions, thereby his right inclusive, by judgment of law, is gone." The error is probably to be attributed to the transcriber.—Ed.

taketh the profits, &c. and the disseisee release to him all actions reals, and after he sueth against him a writ of entry in nature of an assise, by reason of the statute, because he taketh the profits, &c. *Quære*, how the disseisor shall be aided by the said release; for if he will plead the release generally, then the demandant may say, that he had nothing in the freehold at the time of the release made; and if he plead the release specially, then he must acknowledge a disseisin, and then may the demandant enter into the land, &c. by his acknowledgment of the disseisin, &c. but peradventure by special pleading he may bar him of the action which he sueth, &c. though the demandant may enter.

For the more easy understanding hereof, it must be conceived, that although the disseisee in this case might have entered, yet he did not so, but brought his action, thereby to recover his land, his release made to the disseisor of all real actions notwithstanding. 2dly. It is to be observed, *in diebus illis* all lands for the most part were conveyed to feoffees to the only use of the feoffor, and the feoffor did continue the taking of the profits, which was fraudulently and purposely, amongst other, because the party that had cause of action might [not] know who was the tenant of the frank-tenement, [against] whom only real actions must be brought by order of the common law, as before is said; and to prevent this mischief divers statutes were made, and amongst the rest, the statute made 11 H. 6. cap. 4. was one, which is that statute which Littleton did mean in this case. 1 Co. 123 a.

The third thing observable is, the artificial pleading which it becometh the disseisor well to consider of; for on one side, if he plead the release generally, then the demandant may say, that he [who] pleadeth the release had nothing in the frank-tenement at the time of the release made; for he that had a use had *jus neque in re, neque ad rem*; but only a confidence and trust. 1 Co. 121. And on the other side, if he do plead the release specially, then he must confess a disseisin, and then by his own confession the demandant may enter: as in 11 E. 4. fo. 5b. *in fine et seq.* if A disseise B. and I disseise A., in this case A. hath cause to have this land against all, but only against B., yet A. cannot make to him title in this matter

in assise; for if he do bring an action against me, and I do plead in bar, and he saith that B. was seised till by him disseised, and so was he seised, till by me disseised, &c. this title is not good; for the demandant himself do shew that he hath no right; so this case is put only for learning of good pleading, not for other use, as I think, especially after the making of the statute 27 H. 8. cap. 10, by which all uses are taken away, so there is no pernor of profits at this day, against whom any action may be brought. Littleton in the perclose of this case saith, But peradventure by especial pleading he may bar the demandant of this action, &c.; but he doth not shew a form or precedent of such especial plea; *ideo quære inde*; and read the *Doctor & Student*, cap. 55. concerning pleading in assise, whereby the tenants use sometimes to plead in such manner, that they shall confess no ouster.

§ 500. Also, if a man sue an appeal of felony of the death of his ancestor against another, though the appellant release to the defendant all manner of actions real and personal, this shall not aid the defendant, for that this appeal is not an action real, in as much as the appellant shall not recover any realty in such appeal: neither is such appeal an action personal, in as much as the wrong was done to his ancestor, and not to him. But if he release to the defendant all manner of actions, then it shall be a good bar in an appeal. And so a man may see, that a release of all manner of actions is better than a release of actions reals and personals, &c.

And by this cause Littleton doth observe, that a release of all manner of actions is better than a release of actions real and personal, &c. In this case is shewed artificially how to frame a release of an appeal of felony of the death of his ancestors, if so the parties are agreed; for the law doth give to his eldest son, or next heir in blood, the prosecution and revenge by appeal in that case, except the ancestor at the time of his death had a wife living; for then the revenge is given to her, of all which matters read *Stamford's Pleas del Corone*. In this also is shewed to make a release of an appeal of robbery legally.

§ 501. Also, in an appeal of robbery, if the defendant will plead a release of the appellant of all actions personals, this seemeth no plea; for an action of appeal, where the appellee shall have judgment of death, &c. is higher than an action personal is, and is not properly called an action personal; and there if the defendant will plead a release of the appellant to bar him of the appeal, in this case he must have a release of all manner of appeals, or all manner of actions, as it seemeth, &c.

§ 502. But in appeal of mayhem, a release of all manner of actions personals is a good plea in bar, for that in such an action he shall recover nothing but damages.

And so is a release of all actions or of all appeals, and yet in an appeal of mayhem the plaintiff doth declare that the defendant did maim him *felonicè, ut. felo domini Regis*: and see all the matter touching mayhem in *Ferdinando Poulton*, fo. 17. [*de Pace Regis.*]

§ 503. Also, if a man be outlawed in an action personal by process upon the original, and bringeth a writ of error, if he at whose suit he was outlawed, will plead against him a release of all manner of actions personals, this seemeth no plea; for by the said action he shall recover nothing in the personalty, but only to reverse the outlawry; but a release of the writ of error is a good plea.

And with this doth agree 8 Co. 152 b. So if the body of a man condemned in debt be in execution, and the plaintiff released to him the debt, and all executions, and defendant do release to the plaintiff all actions, yet upon the plaintiff's release he may have *audita querela*; for by it he shall recover nothing, but discharge his body from imprisonment. But if the plaintiff after judgment do release to the defendant all actions, and after his body is taken in execution, he shall not have thereupon *audita querela*, for execution is no action. *Co. ibid.* And in this case is observable, that

against this writ of error no execution is taken, because he is outlawed. *Vide* 197, and *nota*, in 8 Co. 152 a. in *fine et seq.*

§ 504. Also, if a man recover debt or damages, and he releaseth to the defendant all manner of actions, yet he may lawfully sue execution by *capias ad satisfaciendum*, or by *elegit*, or *fieri facias* : for execution upon such a writ cannot be said an action.

And because here mention is made of writs of execution in personal actions, it is good to consider of them, and to know the originals. For it is resolved in 3<sup>rd</sup> Co. fo. 12. that at the common law, where a person doth sue a recognizance, or a judgment, for debt or damages, he could not have the body of the defendant in execution, nor his land, but in special cases : but at the common law, he might have execution in such cases only of his goods and chattels, and of his corn and other present profits, which grow upon the land, to which purpose, the common law did give unto him two several writs, a *levari facias*, by which writ the sheriff was commanded *quod de terris et catallis*, [*&c. levari faciat*, *&c.* and another writ called *fieri facias*,] which was only *de bonis et catallis*, both which writs ought to be sued within a year after the judgment or recognizance acknowledged ; and if he had neither the one, nor the other, within the year, the plaintiff, or the cognizee, was driven unto an action of debt. And afterwards by the statute of Westm. 2. cap. 45, a *scire facias* is given, and by the statute of Westm. 2. cap. 18, *cum debitum fuerit recuperatum*, *&c.* the *elegit* is given of the moiety of the lands, which was the first statute that doth subject lands to the execution of a judgment : and with this doth agree *Fitz. N. B. fo. 265*. Other statutes have been made after, which you may see in *Co. ibidem*.

Also, the body of the defendant was not liable to execution for debt at the common law. 13 H. 4. 1. But by the statute of Marlebridge, cap. 23, and Westm. 2. cap. 11, a *capias* was given in an action of account ; for at the common law the process in account was distress infinite, and afterwards by the statute 25 E. 3. cap. 17, the same process was given in debt as in account ; for before this statute the body of the defendant was not liable to execution for debt.

§ 505. But if after the year and day the plaintiff will sue a *scire facias*, to know if the defendant can say any thing why the plaintiff should not have execution, then it seemeth that such release of all actions shall be a good plea in bar. But to some seems the contrary, in as much as the writ of *scire facias* is a writ of execution, and is to have execution, &c. But yet in as much as upon the same writ the defendant may plead divers matters after judgment given to oust him of execution, as outlawry, &c. and divers other matters, this may be well said an action, &c.

And with this agreeth *Brooke, tit. Release, 27, and Scire Facias, 188*, that in *scire facias* for to have execution of damages recovered in a writ, the defendant did plead a release from all manner of actions, and this was holden a good plea, and a bar by all the court. And in *8 Co. 152 a*, it is observed, that *actio est [jus] prosequendi in judicio*; and therefore by a judgment the action is determined; for the judgment is the end of the action, *jus prosequendi in judicio*, and therefore a release of all actions is no bar of executions, (as by other books there is proved). But in a *scire facias* founded upon a judgment, release of all actions is a good plea, because he shall have a new judgment, and therefore there well it may be said, *jus prosequendi in judicio* (1).

Observe here, and in *Fitz. N. B. 266*, and that after the year and day the party who recovered his debt or damages, or to whom a recognizance is acknowledged, may not take execution before he hath given warning to the defendant by a *scire facias*, and more concerning this time of a year and a day, *vide sect. 422*.

§ 506. And I take it, that in a *scire facias* upon a fine, a release of all manner of actions is a good plea in bar.

And Littleton's opinion is, that in a *scire facias* out of a fine, a release of all manner of actions is a good plea in bar; and with

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(1) Lord Coke states the same point more comprehensively and concisely:—  
“Here it is to be observed, that every

writ wherunto the defendant may plead, be it original or judicial, is in law an action.” *Co. Lit. 291 a.*—*Ed.*



this doth agree *Babington*, in 3 *H. 6.* 45 *b.* If a *scire facias* be brought, to have execution out of a fine, if it did vary from the fine it is abateable, and shall not be avoided. *Vide* 9 *H. 6.* 39.

§ 507. But where a man recovereth debt or damages, and it is agreed between them that the plaintiff shall not sue execution, then it behoveth that the plaintiff make a release to him of all manner of executions.

*Ut patet supra*, 505.

§ 508. Also, if a man release to another all manner of demands, this is the best release to him to whom the release is made, that he can have, and shall enure most to his advantage. For by such release of all manner of demands, all manner of actions reals, personals, and actions of appeal, are taken away and extinct, and all manner of executions are taken away and extinct.

§ 509. And if a man hath title of entry into any lands or tencements, by such a release his title is taken away.

*Sed quære de hoc*, for Fitz-James, Chief Justice of England, holdeth the contrary, because an entry cannot be properly said a demand.

§ 510. And if a man hath a rent-service or rent-charge, or common of pasture, &c. by such a release of all manner of demands made to the tenants of the land out of which the service or the rent is issuing, or in which the common is, the service, the rent, and the common, is taken away and extinct, &c.

By these three sections the force of releases of all demands is declared, which *nota*; and see in 8 *Co. fo.* 153 *b.*, *et seq.* the force and operation of this word "demand," which word "demand," *est vocabulum artis*: where also it is said, that although a release of all demands be of so great extent, yet it doth not extend to such writs

by which nothing is demanded, neither in *fait* neither in law, but do lie only to relieve the plaintiff by way of discharge, and not by way of demand; as for example, a writ of error, or *audita querela*. And upon this reason, see in 6 *Co.* 25 *a*, where a writ of error was brought against six, and the release of one of them was pleaded in bar, but it was adjudged that thereby the rest of them are not barred; for by the writ of error they demand nothing, and are not to recover any thing, but are only to be discharged of a burthen laid upon them by the erroneous judgment. • And see the case in 40 *E. 3.* 22. vouched in 8 *Co. ibid.* and in *Finch's book*, fo. 43 *b*, if the lord in chivalry do confirm to the tenant to hold by fealty and certain rent, and release to him all other services and demands, yet he shall have reasonable aid; for it is incident to the service, and is not released by such words. *Vide sect.* 748, by a release of all demands a warranty is extinct; and *nota*, in 10 *Co.* fo. 51 *a, b*, wherein this word “demand” is not of effect, but other words, *et* 6 *H. 7.* 15 *a, b*.

§ 511. Also, if a man releaseth to another all manner of quarrels, or all controversies or debates between them, &c. *quære* to what matter and to what effect such words shall extend themselves.

And of this thus writeth Coke, Chief Justice, in his 8th part, 153 *a*, as unto this word (*querelas*) it is to wit, that quarrels do extend not only to actions as well real as personal, as is holden in 9 *E. 4.* fo. 44, but also unto causes of actions and suits, as it is holden in 39 *H. 6.* fo. 9. so that by the release of all quarrels, not only all actions depending in suit, but causes of actions and suits, also be released. And so it is where one doth release to another all actions, not only actions depending, but causes of actions and suits also be released: where you may read divers book cases in proof hereof, and this word *querela* [is derived a *querendo*] *unde etiam querens* signifieth a man who is the plaintiff; and quarrels, controversies, and debates, are *synonima*, and of one signification(1). And in the said book is explained the sense of this word *sectas* in releases; and of this word “duties,” and of this word

(1) See *Co. Lit.* 292 *a*.—*Ed.*

*titulum*. But I must follow my author, and proceed no further in them, remembering the saying in 10 Co. 51 b, *paroles font plea*.

§ 512. Also, if a man by his deed be bound to another in a certain sum of money, to pay at the feast of St. Michael next ensuing, if the obligee before the said feast release to the obligor all actions, he shall be barred of the duty for ever, and yet he could not have an action at the time of the release made.

The reason of this case of release is, because it was a debt and a duty presently, although the time of payment were not then come: as an executor may release a debt before the testament be proved, because the interest and right of action is in him, though he cannot have an action before the will proved (1). 5 Co. 28 a. and 9 Co. 39 a. *Vide* opinion contrary in this case in *Plowd.* 278 b. And if the obligee do commence and bring his action of debt, and declare thereupon, and it doth appear to the court that then he hath no cause of action, because the day is not come, he may not afterwards at another time have an action upon the same obligation, being barred by judgment that he shall take nothing by this writ. *Bro. tit. Debt*, 175.

§ 513. But if a man letteth land to another for a year, to yield to him at the feast of St. Michael next ensuing, 40s. and afterwards, before the same feast, he releaseth to the lessee all actions, yet after the same feast he shall have an action of debt for the non-payment of the 40s. notwithstanding the said release. *Stude causam diversitatis* between these two cases.

And according to these diversities, [see] Keble's opinion in 9 H. 7. fo. 5 a, a lease is made of land with a stock of cattle, &c.

(1) Lord Coke pursues precisely the same course; see Co. Lit. 292 b.—Ed.

for years, reserving a rent at Michaelmas, &c. the lessor doth release all actions to the lessee before Michaelmas; the duty touching the contract for the stock of cattle is extinct, for that was a duty presently. And so it is in 8 Co. 155 *a*, that if a man be bound to another in a certain sum to be paid at the feast of St. Michael next ensuing, if the obligee before the said feast do release to the obligor all actions, he shall be barred of the duty for ever; for this is a *debitum* presently, although it be not presently *solvendum*. And therefore if one be bound to another in single obligation of 40*l.*, to be paid at four usual feasts of the year, and three of the feasts are incurred, in this case [for 30*l.*] there is *debitum et solvendum* also, and yet the obligee shall not have an action of debt till the last feast be incurred, and this notwithstanding a release of all actions before the last feast, shall discharge all. But if a man let land to another for term of a year, or for longer time, reserving 40*l.* rent to be paid at four usual feasts, by equal portions; in this case, if one feast do incur, he may have an action of debt presently, and shall not stay until all the days be incurred; for there the duty doth accrue upon the perception of the profits of the lands, and till the feast incurred in which it is to be paid, there it is not *debitum nec solvendum*; and there a release of all actions before the feast is no bar; but in respect of the several perception of the profits of the land, the rent after every feast is demandable by action of debt. *Vide librum more at large, and 1 H. 7. 9 b.* And there is said, that these words inserted in this case in Littleton's book, (*stude causam diversitatis*) being fully explained, do shew that [they] were never added by Littleton himself. Also note there, and in 10 Co. 128 *b*, a diversity between a recognizance of a debt payable at several days; for this is not to be resembled to an obligation, but to the other case of a rent reserved upon a lease for years. *Fitz. N. B. 267 b, according. and 10 Co. 128 b. and Longe, 5 E. 4. fo. 40 a. See 5 Co. 70 b, Hoc's case: and 1 Co. 112 b. and Littleton, sect. 748.*

§ 514. Also, where a man will sue a writ of right, it behoveth that he counteth of the seisin of himself, or of his ancestors, and also that the seisin was in the same king's time, as he pleadeth in his plea. For this is an ancient law used, as appeareth by the report of a plea in the eyre of Nottingham, *tit. Droit, in Fitzherbert,*

*cap.* 26, in this form following:—John Barre brought his writ of right against Reynold of Assington, and demanded certain lands, &c. where the mise is joined in bank, and the original and the process were sent before the justices errants, where the parties came, and the twelve knights were sworn without challenge of the parties, to be allowed, because that choice was made by assent of the parties, with the four knights, and the oath was this: That I shall say the truth, &c. whether R. of A. hath more mere right to hold the tenements which John Barre demandeth against him by his writ of right, or John to have them, as he demandeth, and for nothing to let to say the truth, so help me God, &c. without saying to their knowledge. And the like oath shall be made in an attain, and in battle, and in wager of law, for these do bring every thing to an end. But John Barre counted of the seisin of one Ralf his ancestor in the time of King Henry, and Reynold upon the mise joined tendered half a mark for the time, &c. And hereupon Herle, Justice, said to the grand assise after that they were charged upon the mere right, You good men, Reynold gave half a mark to the king for the time, to the intent that if you find that the ancestor of John was not seised in the time that the demandant hath pleaded, you shall inquire no further upon the right; and for this, you shall tell us, whether the ancestor of John (Ralf by name) was seised in King Henry's time, as he hath pleaded, or not. And if you find that he was not seised, in this time, you shall inquire no more; and if you find that he was seised, then you shall inquire further of the writ. And after the grand assise came in with their verdict, and said, that Ralf was not seised in the time of King Henry, whereby it was awarded that Reynold should hold the tenements demanded against him, to him and his heirs quit of John Barre, and his heirs to the remnant. And John in mercy, &c. And the reason why I have shewed to thee, my son, this plea, is to prove the matter precedent which is said in a writ of right; for it seemeth by this plea, that if Reynold had not tendered the half mark to inquire of the time, &c. then the grand assise ought to be charged only to inquire of the mere right, and not of the possession, &c. And so always in a writ of right, if the possession whereof the demandant counteth

be in the king's time, as he hath pleaded, then the charge of the grand assise shall be only upon the mere right, although that the possession were against the law, as it is said before in this chapter, &c.

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This case of a writ of right is to be observed, as it is in Littleton, which is thus briefly abridged in *Bro. tit. Droit de recto*, 41. the tender of the half mark is upon the swearing of the jury, and upon the evidence given. *Vide judgment in Fitz.* 256. *Bro. Droit de recto*, 37. And so it is declared in *Finch's book*, 88. And concerning the justices errant here mentioned, it is said the beginning of them was in *anno* 22 H. 2. and about E. 3. the eires were left. *See the notes upon Hengham*, fo. 147.

It may peradventure be collected hereby by some young student, that Littleton's book was not published till after the eleven years of King Henry 8. because Littleton doth recite this case out of the *Abridgment of Fitzherbert*, which Abridgment was published by him in the eleventh year of the said King Henry 8. as it may appear in the preface to 10 Co. fo. 10: but *cave lector*, for it appeareth in *Plowd. fo.* 58 a, b, there have been some additions to this book, which were not in the first edition, and though this mentioning of *Fitzherbert's Abridgment* be not distinguished with this sign at the beginning, as in the first leaf of Littleton is pointed at, yet doubtless this reciting of *Fitzherbert's Abridgment* was not in the first edition of this book; and so that which is in the end of sect. 513, *stude causam diversitatis entre les deux cases*, was not added by Littleton himself, as you may see in 8 Co. 153 a: and no such mark is there put; and you may find in Littleton's book, sect. 727, that Littleton's book was made before the statute 11 H. 7. cap. 20, *et vide Stamf. Prerog. cap.* 22 & 21, fo. 72. and certain it is that Littleton's book was made and published in the end of the reign of H. 6. as you may see in the preface to 10 Co. fo. 10. and in the end of *Ashe's General Table of all Coke's Reports*.

To this I think it not impertinent to add a word or two of defeazance. Defeazance cometh of the French word (*desfaire*) or (*deffaire*) *infectum reddere quod factum est*, and doth signify in our law nothing but a condition annexed to an act; as to an obligation, a recognizance, or statute, &c. which being performed by the obligee or recognizee, the act is disabled, and made void, as if it had never been done; whereof you may see *Westm. at large*, part 1.

*symb. lib. 2. sect. 156. (Dr. Cowell's Interpreter, verbo Defeasance.)* In all cases when any thing executory is created by a deed, the same thing by the consent of all persons, who were parties thereunto, may be defeated and annulled; and therefore warranties, recognizances, rents-charge, annuities, covenants, leases for years, uses at the common law, and such like, may by a defeazance made by the consent of all, who be parties to the creation of it, by deed be annulled, discharged, and defeated. 1 Co. 113. And of this opinion was Wray, Chief Justice, and all the court. *Ibid. Nihil tam conveniens est naturali æquitati, quam unumquodque dissolvi eo ligamine quo ligatum est.*

### LIB. III. CAP. IX.—CONFIRMATION.

§ 515. A deed of confirmation is commonly in this form, or to this effect: *Know all men, &c. that I, A. of B. have ratified, approved, and confirmed to C. of D. the estate and possession which I have, of and in one messuage, &c. with the appurtenances, in F. &c.*

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In this case the form how to make a deed of confirmation is shewed, as of other instruments is elsewhere declared. *Vide sect. 445.*

§ 516. And in some case a deed of confirmation is good and available, where in the same case a deed of release is not good nor available. As if I let land to a man for term of his life, who letteth the same to another for term of forty years, by force of which he is in possession; if I by my deed confirm the estate of the tenant for years, and after the tenant for life dieth during the term of years, I cannot enter into the land during the said term.

In some cases a deed of confirmation is good and available, where in the same case a deed of release is not good, nor available. As

particularly here is exemplified, in which example, if the tenant for term of life dieth during the term of years, I may not enter into the land during the same term; for that were contrary to my own deed of confirmation. But understand withal, that so long as the lessee for life is living, his lessee for forty years is still tenant to him, and shall pay to his lessor such rents as the said tenant for life did reserve upon his demise for forty years, notwithstanding my confirmation, who was in reversion in fee.

§ 517. Yet if I by my deed of release had released to the tenant for years in the life-time of the tenant for life, this release shall be void, for that then there was not any privity between me and the tenant for years: for a release is not available to the tenant for years, but where there is a privity between him and him that releaseth.

And *vide* 49 E. 3. cap. ult. *per Belk.* and 19 H. 6. 27 b. *per Ascough, accordant.* But if the lessor do release all his right to his lessee for life, this release is good, because there is privity between. *Ibidem.*

§ 518. In the same manner it is, if I be disseised, and the disseisor make a lease to another for term of years, if I release to the termor, this is void: but if I confirm the estate of the termor, this is good and effectual.

If lessee for years (1) be put out, and he in the reversion thereby disseised, and the disseisor do make a lease for years, the lessee who was put out may make a release to the other lessee of the disseisor, and yet there wanted privity: but the disseisor cannot release unto the lessee for years, because he had no frank-tenement. 10 Co. 48 b. But if I confirm the estate of the termor, that is good and effectual.

(1) "Lessee for life" in the MS., which is obviously a mistake, and moreover not according to the case in 10 Co. alluded to.—Ed.



§ 519. Also, if I be disseised, and I confirm the estate of the disseisor, he hath a good and rightful estate in fee simple, albeit in the deed of confirmation no mention be made of his heirs, because he had fee simple at the time of the confirmation. For in such case if the disseisee confirm the estate of the disseisor, to have and to hold to him and his heirs of his body engendered, or to have and to hold to him for term of his life, yet the disseisor hath a fee simple, and is seised in his demesne as of fee, because when his estate was confirmed, he had then a fee simple, and such deed cannot change his estate, without entry made upon him, &c.

§ 520. In the same manner it is, if his estate be confirmed for term of a day, or for term of an hour, he hath a good estate in fee simple, for this, that his estate in fee simple was once confirmed. *Quia confirmare idem est, quòd firmum facere, &c.*

See sect. 467, according; for in these cases *confirmare idem est, quòd firmum facere*; for it is here said, that such a deed may not change his first estate, without entry upon him: *et vide in 5 Co. 81 b*: because the estate of a freehold or inheritance is entire. But if the disseisor make a lease [for years,] of twenty acres, the disseisee may confirm all or any part of the land to the lessee, to have and to hold to him for all or for any part of the years, upon or without condition; for although the term or demise be one; and therefore if the term or demise be confirmed for one hour, it is good for ever; as it is resolved *ibidem*; *vide Plowd. 708 b*; yet the lease and acres are several, and therefore the confirmation may extend to a part of them: *pari ratione*, if my tenant for life do make a lease for years, I may confirm the land to him for less years. *Co. ibidem.*

§ 521. Also, if my disseisor maketh a lease for life, the remainder over in fee, if I release to the tenant for life, this shall enure to him in the remainder. But if I confirm the estate of the tenant for term of life, yet after his decease I may well enter, because nothing is confirmed but the estate of the tenant for life, so that after his decease I may enter. But when I release all my right to the tenant

for life, this shall enure to him in the remainder or in the reversion, because all my right is gone by such release. But in this case, if the disseisee confirm the estate and title of him in the remainder without any confirmation made to tenant for life, the disseisee cannot enter upon the tenant for term of life, for that the remainder is depending upon the estate for life; and if his estate should be defeated, the remainder should be defeated by the entry of the disseisee, and it is no reason that he by his entry should defeat the remainder against his confirmation, &c.

And according to the first point of this section, touching a release, see before, sect. 470, according, *in fine*. And for the other different points touching a confirmation, see 5 Co. 81 b. And if the disseisor make a lease for life or gift in tail, and the disseisee confirm the estate, or by these words, "the land," to the lessee or donee for an hour, this doth confirm all that estate; but doth not enure to the remainder or reversion, because he did confirm the land to the lessee or donee only; and the estate for life or in tail, and the remainder or reversion, be several distinct estates. And the last point in this case, when the confirmation is made to him in the reversion, his reason is, that it should not be reasonable, that he by his entry should defeat the remainder, against his own confirmation; for a remainder cannot be without a particular [estate], no more than a house can stand without a foundation. *Vide* of this last point, *Plowd. Com.* 349. If a disseisor do make a lease for life, and the disseisee confirm the estate of the disseisor, he shall not enter upon the tenant for life (1); for [of] such estate he was not disseised, nor such estate was taken from him, and he may not have a new fee simple; for he had no right, but to the ancient fee simple; *ergo*, for so much as he is barred for the fee simple, he is also barred for all.

§ 522. Also, if there be two disseisors, and the disseisee releaseth to one of them, he shall hold his companion out of the land. But if the disseisee confirm the estate of the one, without more saying

(1) See Co. Lit. 296 a.—Ed.

in the deed, some say that he shall not hold his companion out, but shall hold jointly with him, for that nothing was confirmed but his estate, which was joint, &c.

The first part of this case you may see, *sect. 472*. And concerning the different case of a confirmation, see 1 *Co. fo. 146 b*, that a confirmation cannot alter the quality of an estate, unless it do enlarge the estate. *Vide 7 E. 4. 25 a*; and the first part of the next section is a proof to the effect aforesaid.

§ 523. And for this some have said, that if two joint-tenants be, and the one confirm the estate of the other, that he hath but a joint estate, as he had before. But if he hath such words in the deed of confirmation, to have and to hold to him and to his heirs all the tenements whereof mention is made in the confirmation, then he hath a sole estate in the tenements, &c. And therefore it is a good and sure thing in every confirmation to have these words, “to have and to hold the tenements, &c. in fee, or in fee tail, or for term of life, or for term of years,” according as the case is, or the matter lieth.

§ 524. For to the intent of some, if a man letteth land to another for life, and after confirm his estate which he hath in the same land, to have and to hold his estate to him and to his heirs, this confirmation as to his heirs is void, for his heirs cannot have his estate, which was not but for term of his life. But if he confirm his estate by these words, to have the same land to him and to his heirs, this confirmation maketh a fee simple in this case to him in the land, for that the words “to have and to hold,” &c. goeth to the land, and not to the estate which he hath, &c.

This doth shew a difference when the deed of confirmation doth extend to the estate only, and when the words are expressly to have and to hold the land according to such estate therein, as he intendeth to confirm.

Of which two cases thus it is to be read in *Plowd.* 158 a; Littleton in his book saith, that where a man doth confirm the estate of his tenant for term of life, *habendum* the land to him and to his heirs, that the fee doth pass by it, and this *habendum* is good; and yet the land was not given in the premises, nor nothing was done, but the estate in the land was confirmed, [nevertheless] because in the estate land was contained, this is the cause that the *habendum* the land is pursuing [the premises]. Also, he doth put the case, where two joint-tenants be, and one of them doth confirm the estate of the other, *habendum* the land to him and to his heirs, the fee by this doth pass: by which case it doth appear, that where words be in instruments, which do comprehend other things in intelligence, the thing comprehended do pass by the words; and if it be contained in the premises of the deed, and named in the *habendum* by another name, containing the same substance, the *habendum* is good. And see a case in 4 Co. 35 b.

§ 525. Also, if I let certain land to a *feme sole* for term of her life, who taketh husband, and after I confirm the estate of the husband and wife, to have and to hold for term of their two lives; in this case the husband doth not hold jointly with his wife, but holdeth in right of his wife for term of her life. But this confirmation shall enure to the husband by way of remainder for term of his life, if he surviveth his wife.

Concerning the premises in this case, see sect. 256. And as to the matter in the conclusion, see in *Plowd.* 13 b, in these words; if a woman be tenant for term of life, and a confirmation is made to her [and to her] husband, this doth enure as a remainder to her husband, and yet it did not pass out of the lessor at the time of the first estate.

And in *Plowd. Com. fo.* 160 a, this case is also vouched thus, sometimes the *habendum* will give an estate where nothing was given before the *habendum*, and sometimes it will give to a person who was not named before, and sometimes it will alter the estate given in the premises of the deed; and in proof thereof, this section of Littleton is here vouched, *per* Dyer.

And in 9 Co. *fo.* 139 b, if a *feme covert* be tenant for term of her life, the reversion over in fee, if he in the reversion do confirm the

estate of the husband and wife, *habendum* to them for term of their lives, in this case the husband shall have an estate for life, after the death of his wife; for it should be against reason, that he who hath the reversion in fee, out of which he may derive so many estates for life as he will, should enter into the land after the death of the wife, during the life of the husband, against his own confirmation; when the husband had such an estate, upon which the confirmation might enure by way of extraction of a new estate out of the reversion. *Fide in Dyer, 126 a.*

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§ 526. But if I let land to a *feme sole* for term of years, who taketh husband, and after I confirm the estate of the husband and his wife, to have and to hold the land for term of their two lives: in this case they have a joint estate in the freehold of the land, for that the wife had no freehold before, &c.

In the next antecedent case it is said, if I do let certain lands to a *feme sole* for term of her life, and she taketh a husband, and afterwards I do confirm the estate of the husband and wife to have and to hold for term of their two lives; in this case the husband doth not hold jointly with his wife, but doth hold in right of his wife for term of her life: the reason (though it be not expressed) is, because their estates were not created at one time, neither was her ancient estate altered by the *post* confirmation made by him in reversion to them after the coverture. 17 E. [3]. fo. 68 b, *according*. But otherwise it is in this section; for whereas before she had but a chattel, now by the confirmation she jointly with her husband doth take a freehold. Observe, by such deed of confirmation her ancient lease, which peradventure was for many years to come, is utterly gone and confounded (1).

§ 527. Also, if my disseisor granteth to one a rent-charge out of the land whereof he disseised me, and I rehearsing the said grant confirm the same grant, and all that which is comprised within the same grant, and after I enter upon the disseisor; *quare*, in this case if the land be discharged of the rent or no.

It seemeth in this case the land is charged with the rent; for in 11 H. 7. fo. 28 b, it is thus to be read; *nota*, such things which I may defeat by entry, I may confirm (1); as if I be disseised, and the disseisor grant a rent-charge, my confirmation may make the grant good. And if I enfeoff one upon condition, and the condition is broken, and I do confirm his estate, this confirmation is good; for my entry was lawful, and by my entry the estate might be defeated: but if the confirmation were made before the condition broken, then *nihil operatur* by such confirmation, and so it is adjudged in 1 Co. 147, in *Mayow's case*: and vide in *Keilw.* fo. 103 a. pl. 3, arguments pro et contra. See sect. 529.

§ 528. Also, if a parson of a church charge the glebe land of his church by his deed, and after the patron and ordinary confirm the same grant, and all that is comprised in the same grant, then the grant shall stand in his force, according to the purport of the same grant. But in this case it behoveth that the patron hath a fee simple in the advowson; for if he hath but an estate for life or in tail, in the advowson, then the grant shall not stand but during his life, and the life of the parson which granted, &c.

*Vide sect. 648. Nemo potest plus juris in alium transferre quam ipse habet.*

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§ 529. Also, if a man letteth land for term of life, the which tenant for life charge the land with a rent in fee, and he in the reversion confirm the same grant, the charge is good enough and effectual.

Also, according to this is 1 Co. fo. 147 b. For it is to be observed, that this grant of the rent-charge by the words thereof is absolute, and a fee simple not determinable, by any thing contained within the deed; but in respect of the estate of the grantor it is determinable

(1) Lord Coke observes this general rule, but subjoins two cases in which confirmation is good, without the existence of a right of entry. See Co. Lit. 300 a.—*Ed.*

by his death; and with this also doth agree (1), 26 *Ass. pl.* 38, and 45 *Ass. pl.* 13. Yet see in *Keilw.* 103. *pl.* 3, a contrary opinion. But in this case put by Littleton, if the determination of the rent had been expressed in the deed, the confirmation had not enlarged it, or made it absolute; and therefore if lessee for life had granted to one and his heirs during the life of the lessee for life, and after the lessor had confirmed the rent to the grantee and his heirs, and the tenant for life dieth, the rent doth cease; for the confirmation cannot [enlarge] that which is determinable by express words. *Vide librum.*

§ 530. Also, if there be a perpetual chantery, wherewith the ordinary hath nothing to do or meddle; *quære* if the patron of the chantery, and the chaplain of the same chantery, may charge the chantery with a rent-charge in perpetuity.

Chantery (*cantaria*) is a church or chapel endowed with lands or other yearly revenues for the maintenance of one or more priests daily to sing mass for the souls of the donors and such others as they do appoint; and thereupon such are denominated chantery priests, and are donative, and therefore the patron and they may charge it. *See* 4 *Co.* 108 *b.* *Fitz. N. B.* 209. For the ordinary in a donative, which may pass by gift of a lay patron without induction, hath not to meddle; for he cannot visit such. *Vide Sir John Davies*, 46 *b.* *Fitz. N. B. vide* 10 *Co.* 31 *a.*

§ 531. Also, in some case this verb *dedi*, or this verb *concessi*, hath the same effect in substance, and shall enure to the same intent as this verb *confirmavi*. As if I be disseised of a carve of land, and I make such a deed; *sciant presentes*, &c. *quòd dedi* to the disseisor, &c. or *quòd concessi* to the said disseisor, the said carve, &c.

(1) Lord Coke quotes the same authorities, but marks the distinction with greater precision. "Here is a diversity to be observed, where the determination of the rent is expressed in the deed, and when it is implied in law. For when tenant for life granteth a rent in fee, this by law is

determined by his death; and yet a confirmation of the grant by him in the reversion makes that grant good for ever, without words of enlargement, or clause of distress, which would amount to a new grant." *Co. Lit.* 301 *a.*—*Ed.*

and I deliver only the deed to him without any livery of seisin of the land, this is a good confirmation, and as strong in law, as if there had been in the deed this verb *confirmavi*, &c.

With this doth agree *Brooke, tit. Confirmation, 20 et 21*. But *quære*, saith he, of this word "demise."

And in *Plowd. Com. 154*, this case is vouched to that purpose, in these words; when the intent of the parties doth appear, the law will incline the words which are apt of their proper and common signification unto the intent; and therefore if a disseisee is agreed with the heir of the disseisor, who is in by descent, to confirm his estate, and do make a deed by the words *dedi et concessi* the land to him, this cannot enure in his natural sense; for the nature of *dedi* is to give to one, a thing which he had not before; yet for so much as it cannot so enure, it shall enure as a confirmation, and so the law shall incline the words from his proper signification unto the meaning and intent: where many other cases are to that purpose, *ut res magis valeat quam pereat*.

§ 532. Also, if I let land to a man for term of years, by force whereof he is in possession, &c. and after I make a deed to him, &c. *quòd dedi et concessi*, &c. the said land, to have for term of his life, and I deliver to him the deed, &c. then presently he hath an estate in the land for term of his life.

§ 533. And if I say in the deed, to have and to hold to him and to his heirs of his body engendered, he hath an estate in fee tail. And if I say in the deed, to have and to hold to him and to his heirs, he hath an estate in fee simple: For this shall enure to him by force of the confirmation to enlarge his estate.

*Vide Plowd. 157 b, according, in principio.*

§ 534. Also, if a man be disseised, and the disseisor die seised, and his heir is in by descent, and after the disseisee and the heir of the disseisor make jointly a deed to another in fee, and livery of



seisin is made upon this (as to the heir of the disseisor that sealed the deed), the tenements do pass and enure by the same deed by way of feoffment; and as to the disseisee who sealed the same deed, this shall enure but by way of confirmation. But if the disseisee in this case brings a writ of entry in the *per* and *cui* against the alienee of the heir of the disseisor, *quære* how he shall plead this deed against the demandant by way of confirmation, &c. And know, my son, that it is one of the most honorable, laudable, and profitable things in our law, to have the science of well pleading in actions reals and personals; and therefore I counsel thee especially to employ thy courage and care to learn this.

The intent and purpose in this case was by joining of the heir of the disseisor and the disseisee to make a good and perfect conveyance and assurance of the land to the purchaser.

*Nota*, this case may be an example for many other cases, where divers persons do join in a deed of feoffment; for the law shall make construction and so marshal the words, *ut res magis valeat quam pereat*, that either party may grant that which he may lawfully do, and not otherwise, whereof read in *Plowd.* 59 *a*, in many cases, and in 1 Co. 146 *b*, *Anne Mayow's case*. 6 Co. 18 *a*. And *nota*, as Littleton, *sect.* 648, saith, it is a principle in law, that every land in fee simple may be charged with a rent-charge by one way or other; so it is a maxim in law, that every right or title or interest in *præsenti* or in *futuro* by the joining of all who may claim any such right, title, or interest, may be barred or extinct. 10 Co. 48 *b*, *et seq.* *Nota in Ashe's New Table*, in the title of *Confirmation*, 36.

And the *quære* here made may easily be answered, that he may plead the deed by way of confirmation (1). *Vide inde*, 1 Co. 147.

The tenant may plead a demise made to him jointly; for that pleading did overthrow *Treport's case*, 6 Co. 15 *a*. But if lessee for life, and he in the reversion, join in a lease for life, and the first lessee for life die, the reversioner shall have *ex dimissione propriâ*. *Newdigate's case*, 7 *Eliz.* 234, [*Dyer.*] and 14 *E.* 4. 1 *b*.

And in the end of this section Littleton saith, good pleading hath three excellent qualities: first, it is honorable, laudable, and profit-

able: honorable, for he cannot be a good pleader, but he must be of excellency in judgment; *honor est præmium excellentiæ*: laudable, for the fame and estimation of the professor; *laus est sermo elucidans magnitudinem scientiæ*: and profitable, for three respects; first, for that good pleading is *lapis lilius*, the touchstone of the true sense of the law; secondly, to the client, whose good cause is often lost or long delayed for want of good pleading; for herein is *occasio præceps, et experimentum periculosum*; last, to the professor himself, who being for skill therein exalted above others, *tanquam inter viburna cupressus*, it cannot be unto him, but exceeding profitable. *Pref. to Co. Entries, and read there more at large; and see 8 Co. 35*, the form of pleading is the most strong proof in the law; and in *2 Co. 68 a*, pleading is termed the sure oracle of the law.

§ 535. Also, if there be lord and tenant, albeit the lord confirm the estate which the tenant hath in the tenements, yet the seignory remaineth entire to the lord as it was before.

§ 536. In the same manner it is, if a man hath a rent-charge out of certain land, and he confirm the estate which the tenant hath in the land, yet the rent-charge remaineth to the confirmor.

§ 537. In the same manner it is, if a man hath common of pasture in other land, if he confirm the estate of the tenant of the land, nothing shall pass from him of his common; but notwithstanding this, the common shall remain to him as it was before.

The cause in these three sections is one, (*scil.*) default of words expressly or explanatory according to the meaning of the parties; for it is commonly said *paroles font plea*.

§ 538. But if there be lord and tenant, which tenant holdeth of his lord by the service of fealty and twenty shillings rent, if the lord by his deed confirm the estate of the tenant, to hold by twelve pence, or by a penny, or by a half-penny: in this case the tenant is discharged of all other services, and shall render nothing to the lord, but that which is comprised in the same confirmation.

*Nota*, the confirmation *reddendo* twelve pence, tantamount as if he had said, he shall pay no more of the services, as it is agreed in 14 H. 4. fo. 8 a.

This confirmation is a lessening of the ancient tenure, which is one of the lawful qualities of a confirmation; *vide* 5 Co. 81 b; where it appeareth also, if a lease be made of twenty acres, he in the reversion may confirm his estate in any part of the land, as for one or divers acres; so also he may confirm part, or all, upon condition; for he hath not a bare assent (as in case of attornment), but assent apperelled within interest; and see a diversity between a confirmation and attornment.

§ 539. But if the lord will by his deed of confirmation, that the tenant in this case shall yield to him a hawk or a rose yearly at such a feast, &c. this confirmation is void, because he reserveth to him a new thing which was not parcel of his services before the confirmation: and so the lord may well by such confirmation abridge the services by which the tenant holdeth of him, but he cannot reserve to him new services.

This is a different case from the precedent section, both of them shewing, that the lord may abridge the service by such confirmation, but he may not reserve to him a new service, &c. and *nota* the resolution of the court according, in 9 Co. fo. 142 a, *quælibet confirmatio aut est perficiens, crescens, aut diminuens: perficiens*, as in *Mayowe's case*, in 1 Co. fo. 146 et 147. Also, if the feoffee upon condition do make a feoffment over, and the feoffor do confirm his estate to him and to his heirs, *ista est confirmatio proficiens*; for it doth not make any transmutation of the estate; but doth corroborate and perfect the estate, and maketh it simple and absolute; where it was conditional before. So if the disseisee do confirm the estate of the disseisor, or of his feoffee, it doth perfect and corroborate his estate; for where it was defeisable before, this doth make the estate indefeasible. 2. *Confirmatio crescens*, when it doth enlarge the estate of him to whom the confirmation is made; as to the estate at will to increase it for years, &c.; to the estate for years to increase it for life; to the estate for life to increase it unto an estate tail, &c.; or to an estate tail to increase it in fee. 3. *Diminuens*, as where the lord doth confirm the estate of his tenant, who

holdeth by knight's service, to hold in socage, or to hold by lesser rent; or for a tenant in demesne to hold at the common law; for by it the customs of the manor be diminished: but upon a confirmation to the tenant, the lord cannot reserve new services, as a hawk for rent, *et sic de similibus*.

7 E. 4. 25 a. in *Danby*: *et vide ideo agree*, 6 Eliz. fo. 230 b, *Dyer*.

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§ 540. Also, if there be lord, mesne, and tenant, and the tenant is an abbot, that holdeth of the mesne by certain services yearly, the which hath no cause to have acquittance against his mesne, for to bring a writ of mesne; &c. in this case, if the mesne confirm the estate that the abbot hath in the land; to have and to hold the land unto him and his successors in frank-almoign, or free alms, &c. in this case this confirmation is good, and then the abbot holdeth of the mesne in frank-almoign. And the cause is, for that no new service is reserved, for all the services specially specified be extinct, and no rent is reserved to the mesne, but the abbot shall hold the land of him as it was before the confirmation; for he that holdeth in frank-almoign ought to do no bodily service; so that by such confirmation it appeareth, the mesne shall not reserve unto him any new service, but that the land shall be holden of him as it was before. And in this case the abbot shall have a writ of mesne, if he be distrained in his default, by force of the said confirmation, where *per* case he might not have such a writ before.

Who may have a writ of mesne and of acquittal, read in *Fitz. N. B. fo. 136*. And before, *sect. 135*, also, it appeareth plainly in that case, that although the tenant in frank-almoign did not hold of the mesne, his lord, by any temporal service, yet there was a tenure between them, and the lands are within the fee and seignory of the lord; which also is proved by many books, which you may see before, upon the 133d section, and in *Fitz. N. B. 136*. An abbè did sue a writ of mesne by reason of a confirmation made to him in frank-almoign, and it was maintainable. 5 E. 2. Observe touching this last case vouched in 5 E. 2, that *Fitzherbert* has the same, and would not have set it down, but that he took the law so to be, and

that it is not restrained by the statute *quia emptores terrarum*, made 18 E. 1. (which see, *sect.* 140). And so it may be concluded, as confirmation may abridge his seignory or service, so the lord may by confirmation change his seignory; but he cannot change the possession of the land, or reserve any more tenure or service. *Vide Brooke's Abr. tit. Confirmations.*

§ 541. Also, if I be seised of a villein as of a villein in gross, and another taketh him out of my possession, claiming him to be his villein there, where he hath no right to have him as his villein, and after I confirm to him the estate which he hath in my villein, this confirmation seemeth to be void, for that none may have possession of a man as of a villein in gross, but he which hath right to have him as his villein in gross. And so in as much as he to whom the confirmation was made, was not seised of him as of his villein at the time of the confirmation made, such confirmation is void.

§ 542. But in this case, if these words were in the deed, &c. *sciatis me dedisse et concessisse tali,* &c. *talem villanum meum* this is good, but this shall enure by force and way of grant, and not by way of confirmation, &c.

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Before, *sect.* 531, it is said, that in some cases this word *dedi*, or this word *concessi*, have the same effect in substance, and shall enure to the same intent, as this word *confirmavi*: and in this case Littleton saith, that these words shall enure by way of grant, and not by way of confirmation. And so note, there is no contradiction between the two cases; and the reason wherefore in this case these words shall be of force by way of grant, and not by way of confirmation, is, because that deed should else be of no force or effect to him to whom it was made; for by way of confirmation it is not good, as by the precedent case is shewed; therefore, *ut res magis valeat quam pereat*. And a man may use his deed as shall be most fit for his advantage, and therefore read the case in 2 Co. 35 b, in *Sir Rowland Heyward's case*, a man seised of lands in fee [for money demises, grants, bargains, and sells his land] for years, the lessee hath election, to take it by one way, or by another, as it shall be most for his avail: *et vide librum inde.*

§ 543. And sometimes these words *dedi et concessi* shall enure by way of extinguishment of the thing given ~~or~~ granted; as if a tenant hold of his lord by certain rent, and the lord grant by his deed to the tenant and his heirs the rent, &c. this shall enure to the tenant by way of extinguishment, for by this grant the rent is extinct, &c.

§ 544. In the same manner it is, where one hath a rent-charge out of certain land, and he grant to the tenant of the land the rent-charge, &c. And the reason is, for that it appeareth, by the words of the grant, that the will of the donor is, that the tenant shall have the rent, &c. And in as much as he cannot have or perceive any rent out of his own land, therefore the deed shall be intended and taken for the most advantage and avail for the tenant that it may be taken, and this is by way of extinguishment.

And so it appeareth that in this case and in divers other cases the law doth reduce the words according to apt meaning of the parties. *Vide Plowd.* 170 *b.*

§ 545. Also, if I let land to a man for term of years, and after I confirm his estate without putting more words in the deed, by this he hath no greater estate than for term of years, as he had before.

For the understanding of this case, see *sections* 532 and 533.

§ 546. But if I release to him all my right which I have in the land, without putting more words in the deed, he hath an estate of freehold. So thou mayest understand, my son, divers great diversities between releases and confirmations.

This case, and the reason thereof, is put before in the chapter of Releases, *sect.* 465; and it is also remembered by Saunders, Justice, in *Plowd.* 161, inferring thereby, that deeds must have a reasonable exposition, and that without wrong to the grantor, and with the most

advantage to the grantee. As if an abbè do grant a corody to one for himself, and one servant to sit with him at his mess, he may [not] bring one who hath a horrible disease: so if one do grant estovers to another out of his manor, he may not cut down his fruit trees: so if one grant to another common in his land for all his cattle, he may not have common for goats nor geese, which be noisome things for the land. So there is an equity in grants, so that they shall not be taken so strongly against [the] grantor, that it should be unreasonable: and with reasonableness it shall be extended very largely to the grantee, as a release by the lessor of all his right made to the lessee for years, shall enlarge his estate for his life; but if the grantor were tenant in tail, then it shall be but for the life of the tenant in tail: and there you may find other cases to this effect.

§ 547. Also, if I being within age let land to another for term of twenty years, and after he granteth the land to another for term of ten years, so he granteth but parcel of his term: in this case when I am of full age, if I release to the grantee of my lessee, &c. this release is void, because there is no privity between him and me, &c. But if I confirm his estate, then this confirmation is good. But if my lessee grant all his estate to another, then my release made to the grantee is good and effectual.

*Nota sect. 517.* The rule is taught, that a release made unto a tenant for term of years, is not avoidable, but where there is privity between the lessee and him who maketh the release, which was not in the first part of this section. But if my lessee grant all his estate to another, then my release made to the grantee is good and effectual: for as unto this purpose there are three manners of privities. 1. Privity in respect of the estate only. 2. Privity in respect of the contract only. The third privity in respect of the estate and contract together. - Privity of the estate only is between the lessor and the assignee of the lessee; for no contract was made between them: so if the lessor do grant over his reversion, or if the reversion do escheat, between the grantee, or the lord by escheat, and the lessee, is privity of estate only. Privity in respect of the contract only is a personal privity, and doth extend only to the person of the lessor, and the person of the lessee; as when the lessee doth assign over

all his interest, notwithstanding his assignment, the privity of the contract doth remain between them, although the privity of the estate be removed, and the lessor may have an action of debt against the first lessee for the rent reserved. The third privity is, of the contract and of the estate together, as between the lessor and the lessee themselves. 3 Co. 23 a, *Walker's case*; and in *Dyer*, fo. 4.

§ 548. Also, if a man grant a rent-charge issuing of his land to another for term of his life, and after he confirmeth his estate in the said rent, to have and to hold to him in fee tail or in fee simple; this confirmation is void as to enlarge his estate, because he that confirmeth hath not any reversion in the rent.

§ 549. But if a man be seised in fee of a rent-service or rent-charge, and he grant the rent to another for life, and the tenant at-torneth, and after he confirmeth the estate of the grantee in fee-tail, or in fee simple, this confirmation is good, as to enlarge his estate according to the words of the confirmation, for that he which confirmed at the time of confirmation had a reversion of the rent.

§ 550. But in the case aforesaid, where a man grants a rent-charge to another for term of life, if he will that the grantee should have an estate in tail or in fee, it behoveth that the deed of grant of the rent-charge for term of life be surrendered or cancelled, and then to make a new deed of the like rent-charge, to have and perceive to the grantee in tail or in fee, &c. *Ex paucis plurima concipit ingenium.*

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But in the first of these two precedent sections, where a man granteth a rent-charge to another for term of life, if he will that the grantee shall have estate in the tail, or in fee, it behoveth that the deed of the grantee of the rent-charge for term of life be surrendered or cancelled, and then to make a new deed of such rent-charge to have and to take to the grantee in tail or in fee.

*Ex paucis plurima concipit ingenium: multo utilius est pauca idonea effundere, quam multis inutilibus homines gravari: 4 Co. 20 b: sicut languor prolixus gravat medicum, ita relaxatio prolixa gravat lectorem. 7 Co. Epist. fo. 2 a.*



## LIB. III. CAP. X.—ATTORNMENT.

§ 551. Attornment is, as if there be lord and tenant, and the lord will grant by his deed the services of his tenant to another for term of years, or for term of life, or in tail, or in fee, the tenant must attorn to the grantee in the life of the grantor, by force and virtue of the grant, or otherwise the grant is void. And attornment is no other in effect, but when the tenant hath heard of the grant made by his lord, that the same tenant do agree by word to the said grant, as to say to the grantee, "I agree to the grant made to you," &c. or "I am well content with the grant made to you:" but the most common attornment is, to say, "Sir, I attorn to you by force of the said grant," or "I become your tenant," &c. or to deliver to the grantee a penny, or a half-penny, or a farthing, by way of attornment.

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For the better understanding of this whole chapter, I will set down the words of Pollard, Serjeant, in *Plowd. Com. fo. 25a*. It is to be considered, noted, and known, that in every commonwealth it is necessary and requisite, that things be certainly known; for certainty doth engender repose, and uncertainty contention; the occasion of which contention our law, foreseeing, hath prevented, and therefore hath ordained certain ceremonies to be used in the alteration or transmutation of things from one to another: and therefore in every grant of reversions, rents, and services, attornment shall be made; as in every feoffment the law hath ordained that livery and seisin be made, which be points certain, concerning time; and by these estates do pass. And upon the same reason the law hath ordained and appointed, that every remainder shall have certain things, as notes and rules certain to know and discern when remainders be good, &c.

And attornment may be made by the tenants unto the lord in his court, unto the steward in the absence of the lord, or purchaser. *Attornment, Brooke, 40*. And in *2 Co. fo. 69a*. it is resolved, that if the tenant have notice of the grant by a stranger, he may attorn and assent unto the grant in the absence of the grantee; and Popham, Chief Justice, there said, that so it hath been adjudged, contrary to the opinion of 28 H. 8. *Brooke, Attornment*.

Attornment may be made either by express words; but *nota* in special [cases] a deed is requisite *ex institutione legis* to make good attornment; 6 Co. 38*b*; or actual deed, as by delivery of a penny, or a farthing, to the grantee in the name of attornment, or by any other matter which doth imply an agreement, as surrender to the grantee in the reversion, prayer in aid of him, &c. *Finch, fo. 42 b.* It is herein said, that attornment is nothing in effect, but the agreement of the tenant to the grant made by the lord; *ergo* a tenant of non-sane memory cannot attorn. 32 *Edw. 3. tit. Age*, 80, which see in 6 Co. 69. But observe the words of Littleton in this section, he saith, that attornment may be made either by words declaring the tenant's consent to his lord's grant, or by delivering to the grantee a penny, a halfpenny, or a farthing, by way of attornment.

So it seemeth he took the law to be, that the tenant in that case of attornment should either explain his intent by words, &c. or by the payment of some piece of money by way of attornment, and not by delivery of any other thing in lieu thereof. And *Finch*, in his first book, *fo. 9 b.* saith, upon a grant of a rent the tenant cannot attorn, nor put the grantee into possession by a bullock, or such thing, because it is another thing, for which he vouched. 49 *E. 3. fo. 15 b.* And in 9 Co. 79, it is said, *nummus est [mensura] rerum commutandarum, et res per pecuniam æstimatur, et non pecunia per res; pecunia obediunt omnia.* *Nota*, saith Sir John Davies in his book, *fo. 44 b.* that in divers cases assent after a thing done doth give force unto it, as attornment doth give force to a grant of a reversion made before; also, if a disseisin be made to the use of John-at-Stile, his agreement after doth make him a disseisor, as if he were present at the time of the committing of the disseisin. *Vide Plowd. 31 b.*

§ 552. Also, if the lord grant the service of his tenant to one man, and after by his deed, bearing a later date, he grant the same services to another, and the tenant attorn to the second grantee, now the said grantee hath the services; and albeit afterwards the tenant will attorn to the first grantee, this is clearly void, &c.

Although attornment doth not give any interest, and is but a naked assent to perfect a grant by another, (9 Co. 85*b.* and 2 Co.

67 a.) yet it is so necessary a ceremony to be done, without it the grant hath not perfection, neither is the thing out of the grantor, notwithstanding his deed, till by the subsequent act of attornment, as Littleton here declareth, the said grant be perfected (1). 6 Co. 69 a. And therefore if a [manor] be granted by fine, the grantee may compel the tenant to attorn, by a writ of *quid juris clamat*; or if a seignory be granted by fine, the grantee may have a *quid juris clamat*; but if the grant be made by deed or feoffment there is no means to compel the tenant to attorn, but if he do attorn *gratis* it is good. 9 Co. 85 a, b. *Vide sect.* 586. For it is convenient and necessary that the tenant be made privy to such grants made by his landlord, before he be compelled by the law to pay to his grantee his services, and to be attendant to the grantee. *Vide* 14 H. 8. 18 a. according. 11 H. 7. 12 a. *Vide in* 4 Co. 71 a, when a man by deed indented according to the statute 27 H. 8. cap. 16. did bargain and sell his land to J. at S. and his heirs, and before the inrolment the bargainor doth levy a fine to him and to his heirs, though after the indenture be inrolled within the six months, yet the cognizee shall be in by fine only; for when the fee simple doth pass by the fine to the cognizee and his heirs, the inrolment of the deed indented afterwards cannot divest and turn the state of himself, which was absolutely established in him by the fine. *Vide librum, and the consequence.* And note, although the thing granted be not out of the grantor till the attornment be had, the deed notwithstanding, yet the grant doth take such effect against himself, that he cannot, by any words or act he can use, countermand it. 4 Co. 61 b. *See in Plowd.* 344 a, if a man have a reversion in fee of two acres, which J. at S. holdeth for life, and he doth grant unto another the reversion of the land, which J. at S. holdeth for life, and after the grantor doth purchase the reversion of any other acre, which J. at S. holdeth for life, and afterwards J. at S. doth attorn to the grantee of all the three acres, the third acre doth not pass; for in the grant of the reversion of all the land he had no intent but of two acres only, and although that the grant doth not take effect till the attornment had, yet the attornment shall make no more to pass than was contained in the intent of the first grant.

(1) See 11 H. 7. 12 a, a man maketh a lease for life, and after doth grant the reversion to one, and after doth grant the reversion to another, and the tenant doth attorn to both at one time. *Quere.—Note in MS.*

§ 553. Also, if a man be seised of a manor, which manor is parcel in demesne, and parcel in service, if he will alien this manor to another, it behoveth that by force of the alienation, all the tenants which hold of the alienor as of his manor do attorn to the alienee, or otherwise the services remain continually in the alienor, saving the tenants at will; for it needeth not that tenants at will do attorn upon such alienation, &c.

So we see, that by livery of seisin the lands and demesnes do pass, and if afterwards the tenant do attorn the rents shall also pass. 1 *H. 7. fo. ult. a.* But Keble, in 11 *H. 7. fo. 8 b.* [saith] that the feoffee in this case shall not have the rents due after the feoffment, but only the rents due after the attornment: and according to Littleton it was adjudged in the Common Pleas, 15 Eliz. as appeareth (1) in 6 *Co. 69 a.* But in pleading of a feoffment of a manor, [he need not plead an attornment of the tenants] but this shall come in the other part (2). *Ibidem.* For peradventure the attornment was a year or more after the feoffment or grant, *quod nota.* And the reason and cause, wherefore the tenant at will need not to attorn upon an such alienation is, because his interest is determined by the feoffment and alienation of the manor; and it seemeth that tenants by copy of court roll (3) need not to attorn; for they are tenants at will in the law. *Brooke, tit. Attornment, 44.*

§ 554. Also, if there be lord and tenant, and the tenant letteth the land to another for term of life, or giveth the land in tail saving the reversion to himself, &c. if the lord in such case grant his seignory to another, it behoveth that he in the reversion attorn to the grantee, and not the tenant for term of life, or the tenant in tail, because that in this case he in the reversion is tenant to the lord, and not the tenant for term of life, nor the tenant in tail.

(1) See *Co. Lit. 311 a.—Ed.*(2) See *Co. Lit. 310 b.—Ed.*(3) *Co. Lit. accordat, 311 a.—Ed.*

*Nota* the reason, because he in the reversion is tenant to the lord, not the tenant for life, nor the tenant in tail. *Vide Finch*, 42 a, *according*.

§ 555. In the same manner is it where there are lord, mesne, and tenant, if the lord will grant the services of the mesne, albeit he maketh no mention in his grant of the mesne, yet the mesne ought to attorn, &c. and not the tenant peravail, &c. for that the mesne is tenant unto him, &c.

§ 556. But otherwise it is where certain land is charged with a rent-charge or rent-seck; for in such case if he which hath the rent-charge grant this to another, it behoveth that the tenant of the freehold attorn to the grantee, for that the freehold is charged with the rent, &c. And in a rent-charge; no avowry ought to be made upon any person for the distress taken, &c. but he shall avow the prisel to be good and rightful, as in lands or tenements so charged with his distress, &c.

And the reason in these two cases is, because the attornment and agreement to the grant must be by that tenant, who shall presently be charged. *Finch*, lib. 2. fo. 42. And observe the reason, wherefore the tenant in this case is in law called the tenant peravail, in 9 Co. 85 a.

And see this case and the diversity between it and the next precedent case vouched and agreed by the court in [6] Co. fo. 59: and there it is said, that it appeareth by 21 H. 6. fo. 9. that if the tenant, out of which a rent-charge is issuing, be disseised, and he who hath the rent doth grant it over, the disseisee cannot attorn; because he hath no freehold, although he hath the mere right unto it. *Ibidem*. If the tenant of the freehold must attorn to the grantee of the rent, (as Littleton doth hold) à fortiori the frank-tenant only ought to give seisin; so seisin is more than attornment, but attornment doth not include seisin.

The last thing moved in this case is, to shew how the avowry is to be made in case of a rent-charge by the order of the common law, differing from the avowry which the lord is to make upon his very tenant for service due, whereof you may see before, sect. 454.

§ 557. Also, if there be lord and tenant, and the tenant letteth his tenement to another for term of life, the remainder to another in fee, and after the lord grant the services to another, &c. and the tenant for life attorn, this is good enough, for that the tenant for life is tenant in this case to the lord, &c. and he in the remainder cannot be said to be tenant to the lord, as to this intent, until after the death of the tenant for life; yet in this case if he in the remainder dieth without heir, the lord shall have the remainder by way of escheat, because that albeit the lord in such case ought to avow upon the tenant for life, &c. yet the whole entire tenement, as to all the estates of the freehold or of fee simple, or otherwise, &c. in such case are together holden of the lord, &c.

But not to make avowry upon them all together. M. 3 H. 6.

The reason is, although that the lord in this case ought to avow upon the tenant for term of life, &c. yet all entire tenements, as unto all the estates of freehold, or of fee simple, or otherwise, &c. in such cases, be together holden of the lord, &c.; and see the diversity in *Finch, lib. 2. 42 a.* between this and the 562d section. And upon these words in this section (*ceo est assets bone*) that is to be known, that this attornment made by the tenant for term of life shall enure also to him in the remainder; as if a tenant in fee simple do make a lease for life, the remainder in fee, and the tenant for life do give notice to the lord, it shall serve for him in the remainder, so that he shall be compelled to avow upon him in the remainder, if the tenant for life be dead. So if an infant do make a lease for years, the remainder for years unto a stranger, reserving rent, if he at full age do accept the rent by the payment of the first tenant for years, this is a good assent also to the remainder, and shall never put him out. *Plowd. 545 b.*

§ 558. Also, if there be lord and tenant, and the tenant letteth the tenements to a woman for life, the remainder over in fee, and the woman taketh husband, and after the lord grant the services, &c. to the husband and his heirs; in this case the service is put in suspense during the coverture. But if the wife die living the husband,

the husband and his heirs shall have the rent of them in the remainder, &c. And in this case there needeth no attornment by parol, &c. for that the husband which ought to attorn, accepted the deed of grant of the services, &c. the which acceptance is an attornment in the law.

§ 559. In this same manner is it, if there be lord and tenant, and the tenant taketh wife, and after the lord grant his services to the wife and her heirs, and the husband accepteth the deed; in this case after the death of the husband the wife and her heirs shall have the services, &c. for by the acceptance of the deed by the husband, this is a good attornment, &c. albeit during the coverture the services shall be put in suspense, &c.

§ 560. Also, if there be lord and tenant, and the tenant grant the tenements to a man for term of his life, the remainder to another in fee, if the lord grant the services to the tenant for life in fee, in this case the tenant for term of life hath a fee in the services; but the services are put in suspense during his life. But the heirs of the tenant for life shall have the services after his decease, &c. And in this case there needeth no attornment; for by the acceptance of the deed by him which ought to attorn, &c. this is an attornment of itself.

And actual attornment in these cases is not necessary, but attornment in law is sufficient; for thereby the agreement of him that should attorn is proved. The reason and cause of the suspension of the service in these cases is one, viz: by the law no man can pay or perform them to himself; for there must be agent and patient: *vide sect. 57*: and the husband and wife are but one person in the law. *Vide sect. 168*. And to this effect it is said in Sir John Davies' book, 82*a*, the common law doth dispense with express attornment, where the reversion is granted to him, who should attorn; as with actual delivery of a legacy, where the legatory is made executor, who may pay himself by way of retainer; so in case of assignment of dower, where the woman is guardian in socage, [she] may endow herself *de la plus beale*: which case is also in *Fitz. tit. Fines, 7*. and is vouched and approved in 10 Co. 52; *non enim refert an quis assensum suum præbet verbis, an rebus ipsis et factis*. *Vide Dyer, 358*.

§ 561. But where the tenant hath as great and as high estate in the tenements as the lord hath in the seignory; in such case, if the lord grant the services to the tenant in fee, this shall enure by way of extinguishment. *Causa patet.*

*Causa patet* in this case, which is because by the nature of extinguishment the tenant could not have or receive the services, which were granted to him; but from thenceforth, the tenant must hold that land of the lord paramount.

And this cause doth shew the difference between it and the three precedent sections, in which there was a suspension, but *tantum pro tempore quousque*; but in this, utter extinguishment by unity in possession. And the natures of these things are to be considered, which may be subject to extinguishment, as which issue out of land, as seignory, rent-charge, &c. are subject to extinguishment to all intents; as if the lord do grant his seignory to the ter-tenants, and a stranger, there shall be no joint-tenancy or survivor between them. [and] the moiety of the seignory is extinct to all intents and purposes. *Plowd. Com.* 419 a. 11 H. 7. 13 a.

Also, if the lord release to the tenant all his right in the seignory, or in the land, such a release doth go by way of extinguishment against all persons. *Littleton*, 112 b. [s. 543.] Real actions also, and conditions, be subject to extinguishment; and there [it] is *quasi* by unity of possession: as in all cases of remitter, there he, that hath the right of action for land, hath the possession of the same land, so that there is not any person against whom he can bring his action, and therefore the action is extinguished for ever.

And for the same reason a condition, which doth give title of re-entry in the land, is extinguished by the purchase of the land, or part of it. 8 H. 7. 8 b. 33 H. 8. *Bro. Extinguishment*, 49.

A warranty is extinguished by re-infeoffment, or by descent of the land to the same person who hath the warranty. 40 E. 3. 13. *Vide* of all these matters more at large in Sir John Davies' book, *fo.* 5 a. *et b.*

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§ 562. Also, if there be lord and tenant, and the tenant maketh a lease to a man for term of his life, saving the reversion to himself, if the lord grant the seignory to tenant for life in fee, in this case it behoveth that he in the reversion must attorn to the tenant for



life by force of this grant, or otherwise the grant is void, for that he in the reversion is tenant to the lord, &c.

Yet he shall not hold of the tenant for life during his life. *Causa patet*, &c.

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And so you may observe the diversity between this case and the former, sect. 557. *Finch*, 42*a.* according.

§ 563. Also, if there be lord and tenant, and the tenant holdeth of the lord by xx manner of services, and the lord grant his seignory to another; if the tenant pay in deed any parcel of any of the services to the grantee, this is a good attornment of and for all the services, albeit the intent of the tenant was to attorn but for this parcel, for that the seignory is entire, although there be divers manner of services which the tenant ought to do, &c.

Attornment is as a loving nurse to give nourishment and vigour, not as a mother to beget or create a grant; therefore, for so much as attornment is but only an assent to perfect the grant of another, he who doth attorn cannot apportion, divide, or alter the grant, and therefore if he do attorn in part, that shall not be taken to be void, but shall be taken most strongly against him, and shall be in law, attornment for all; 2 *Co.* 67*b*; where you may read many other cases to this effect. And it is like to the grant of the lord of the manor, or his admittance of a copyholder after surrender; for he hath only a customary power to make admittance *secundum formam et effectum sursum redditionis*. 4 *Co.* 28*b.* et *fo.* 26*b.*

Note the diversity between a bare assent, without any right or interest, and an assent coupled with a right and interest; for the tenant, who is to perfect a grant by his attornment, cannot assent for one time, or upon condition, or for part of the thing granted, but it shall enure to all absolutely; because [he] had but a bare assent, which may not be qualified or apportioned. But in case of a confirmation made by a dean and chapter to a grant, they have not only a power of confirmation, but an inheritance in the thing also granted; therefore they confirm for part, or for all, or upon condition. *Nota Foord's case*, in 5 *Co.* 81*a.* 22 *Ass.* pl. 66. pay-

ment of a penny, in name of attornment of all, may be sufficient seisin of four rents. 4 Co. 9b. *vide Finch, lib. 1. fo. 16 b. in fine.* And upon these last words in the end of Littleton's case, (*scil.*) that the seignory is entire, though there be divers manners of service, which the tenant is to do, *vide in 9 Co. 36 a.*

§ 564. Also, if there be lord and tenant, and the tenant holdeth of the lord by many kind of services, and the lord grant the services to another by fine; if the grantee sue a *scire facias* out of the same fine for any parcel of the services, and hath judgment to recover, this judgment is a good attornment in law for all the services.

This is also an attornment in law, and for the reason last before shewed.

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§ 565. Also, if the lord of a rent-service grant the services to another, and the tenant attorn by a penny, and after the grantee distrain for the rent behind, and the tenant make rescous; in this case the grantee shall not have an assise for the rent, but a writ of rescous, because the giving of the penny by the tenant was not but by way of attornment, &c. But if the tenant had given to the grantee the said penny as parcel of the rent, or a half-penny or a farthing, by way of seisin of the rent, then this is a good attornment, and also it is a good seisin to the grantee of the rent; and then upon such rescous the grantee shall have an assise, &c.

And according it is agreed in 6 Co. [59] that seisin is more than attornment; for every lawful [seisin] doth include attornment; but attornment doth not include seisin: and *ibidem* a diversity is taken between attornment and seisin; for in the case of a grant of a seignory, or of a reversion, &c. unto attornment privity in estate is requisite; but not unto seisin.

And in 10 Co. fo. 127 b, if the lessee, donee, or tenant, do pay his rent before the day, this is voluntary, but not satisfactory; but if it be paid in name and seisin of the rent, although it doth not

enure by way of satisfaction, yet it doth (1) give sufficient seisin to this purpose to have his assise, or other remedy; for the law hath delectation in giving remedy (2) (as the book saith): and to that purpose see in 7 Co. 28 b. For in 4 Co. fo. 9 b. *et seq.* if lord and tenant by fealty and 20d. rent, the lord doth grant over his seignory, and the tenant doth pay 2d. to the grantee in the name of seisin of the rent, yet at the rent day the lord shall have the whole of 20d.; for the 2d. cannot be parcel of the rent; for no rent was due or payable till the day; and yet it shall endure to that purpose, as to give seisin of the rent.

And the reason the grantee of the services, after lawful seisin, may have an assise is, because of the rescous; for that rescous is one of the causes of a disseisin of rent-service, as before, sect. 237, may appear.

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§ 566. Also, if there be many joint-tenants which hold by certain services, and the lord grant to another the services, and one of the joint-tenants attorn to the grantee, this is as good as if all had attorned, for that the seignory is entire, &c.

This point came in judgment *anno* 43 Eliz. and is at large in 2 Co. 67 a; and amongst divers other reasons and authority proving the resolution of the court is said thus: Littleton, in his chapter of Attornment saith, that if lord and two joint-tenants be by certain services, and the seignory is granted over, and the one joint-tenant doth attorn, this is as good, as if both had attorned, because the seignory is entire; which censure of Littleton in his book, which is the ornament of the common law, and the most absolute and perfect work that ever was written in any human science, the court prefer before the sudden opinions of 39 H. 6. 2 b. and 32 E. 3. *titulo Quid juris clamat*, 5. [But if the reversion of two tenants for life, or the rent, or seignory of two joint-tenants be granted by fine, there in a *quid juris clamat*] *quem redditum reddit*, or *per quæ servitias* against such joint-tenants, the one shall not be permitted to attorn without his companion; and that for two causes; first, because the

(1) "Doth not give," in MS.—Ed.

come to rights or duties are ever taken

(2) Lord Coke says, "the reason of the diversitiy is, for that remedies to

favorably." Co. Lit. 315 a.—Ed.

plaintiff must have attornment in the same manner as he hath demanded it, as it is holden in 9 H. 6. 21. 2d. If the one should attorn only, he might prejudice his companion, as if he would not claim to be dispunished of waste, or condition to have fee, or future term, &c. for upon a general attornment in court of record, the lessee shall lose all advantages which be not claimed of record: for the question is demanded of him, *quid juris clamat*? And therefore he shall have no more than he doth claim of record; and for [this] cause the one joint-tenant only shall not be permitted to attorn of record, for the manifest prejudice which might grow unto his companion, if that should be the attornment of both. But in this case of a grant by deed, no such prejudice may happen, and therefore the attornment of the one shall bind both, because this cannot prejudice his companion. So, and for the same cause, if one joint-tenant do attorn in the country to the cognizee, where the grant is by fine, this shall bind both. And *nota ibidem in 2 Co. 68 a*, in what cases one joint-tenant may prejudice his companion, and in what not.

§ 567. Also, if a man letteth tenements for term of years, by force of which lease the lessee is seised, and after the lessor by his deed grant the reversion to another for term of life, or in tail, or in fee; it behoveth in such case that the tenant for years attorn, or otherwise nothing shall pass to such grantee by such deed. And if in this case the tenant for years attorn to the grantee, then the freehold shall presently pass to the grantee by such attornment without any livery of seisin, &c. because if any livery of seisin, &c. should be or were needful to be made, then the tenant for years should be at the time of the livery of seisin ousted of his possession, which should be against reason, &c.

If a man let tenements for term of years, by force of which lease the lessee is seised, that is to say, possessed, and after the lessor by his deed doth grant the reversion to another for life, &c. it behoveth in this case the tenant for term of years to attorn; by which it appeareth that before the lessee did enter, he had no actual possession, nor, as it seemeth, the lessor had no such reversion, that he

might grant it over by name of reversion: but yet such a lessee hath more than he that hath a future interest; for he may enter presently, and take the profits, which he may transfer unto another, and may not be divested out of them, and put unto a mere right not grantable. 5 Co. 124 b. A man seised in fee simple maketh a lease for twenty years, his lessee maketh a lease thereof for ten years, then he in reversion granteth his reversion, now the attornment of the lessee for years is not good, for want of privity; but if he in the reversion do enter upon the lessee for ten years, and put him out, and maketh a feoffment, and after the lessee enter, it is good attornment in the law. 6 Co. 69 a.

§ 568. Also, if tenements be letten to a man for term of life, or given in tail, saving the reversion, &c. if he in the reversion in such case grant the reversion to another by his deed, it behoveth that the tenant of the land attorn to the grantee in the life of the grantor, or otherwise the grant is void.

§ 569. In the same manner is it, if land be granted in tail, or let to a man for term of life, the remainder to another in fee, if he in the remainder will grant this remainder to another, &c. if the tenant of the land attorn in the life of the grantor, then the grant of such a remainder is good, or otherwise not.

If a man make a lease for years of a manor, to commence at a day to come, the tenant may attorn either before the day, or after, so that attornment be in the life of the parties (1). 2 Co. 35 b. And *nota* in 1 Co. 104, it is said, that this is the reason of the book, 40 Ass. pl. 19, and of *Monsieur Littleton's case*, fo. 128, that if one do grant a reversion or a seignory by deed unto J. at S. and his heirs, if the grantee dieth before attornment, the attornment to the

(1) Where there is an assent only requisite, there it must be in the life of both parties. H. maketh a lease to B. for as many years as J. S. shall name, and H. doth die before he name, he may not name after. Com. 273 b. So if A. maketh

a lease for as many years as his executors shall name, it is a void lease; for the executors are not till after his death, at which time it is not lawful for them, but void. 6 Co. *Evesq. de Bath*, [fo. 35.]—*Note in MS.*

heir is void; for if the attornment should be good, then should the heir be in as a purchaser, whereas by the grant and meaning of the parties, those words, "his heirs," are words of limitation, to limit the estate of the grantee himself (1). And so it was holden in *Nichol's case, in Plowd. Com. fo. 483*, that if a man let lands to another for life, and if the lessor die without heir of his body, that the heir of the lessee should have the lands to him and to his heirs; in this case, if the lessee for life die, then the lessor dieth without heir of his body, the heir of the lessee shall not have the land; *causâ quâ suprà*. And so is the law clear, as it is agreed commonly in our books, if two men do exchange lands in fee, or in fee tail, if any of the parties die before the exchange be executed in every part, the exchange is void; for if the heirs should enter, they should be in as purchasers by force of the words, which were words of limitation of the estate, and not of purchase. And upon the same reason is *Brett and Rigden's case* adjudged, in *Plowd. Com. 342*.

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§ 570. Pasch. 12 Edw. 4. It is there holden by the whole court, that tenant in tail shall not be compelled to attorn, but if he will attorn *gratis*, it is good enough.

Pasch. 12 Edw. 4. fo. 3 et 4 (2). There it is holden by all the court, that tenant in tail should not be compelled to attorn; the reason thereof is alleged, because the tenant in tail hath such estate which by includement of law may continue, and endure as perpetual as the estate of the donor; but if he attorn *gratis*, it is good enough. 9 Co. 85 b, *accordant, in fine. Vide librum.*

§ 571. Also, if land be let to a man for years, the remainder to another for life, reserving to the lessor a certain rent by the year,

(1) Grantee may change, and attornment remain good. A lease for life, the remainder for life, the reversion is granted, the first tenant for life dieth, the second in remainder doth attorn, and good. Two joint-tenants for life, the one doth die after the reversion is granted, and before attornment, yet attornment by the other

is good; so is Tooker's case, 2 Co. fo. 68. —*Note in MS.*

(2) Fairfax, 12 E. 4. 3, saith, the reason why tenant in tail shall not be compelled to attorn, is, because he is dispensable of waste; for attornment, saith he, is for nothing but to make a privity.—*Note in MS.*

and livery of seisin upon this is made to the tenant for years ; if he in the reversion in this case grant the reversion to another, &c. and the tenant which is in the remainder after the term of years attorn, this is a good attornment, and he to whom this reversion is granted by force of such attornment shall distrain the tenant for years for the rent due after such attornment, albeit that the tenant for years did never attorn unto him. And the cause is, for that where the reversion is depending upon an estate of freehold, it sufficeth that the tenant of the freehold do attorn upon such a grant of the reversion, &c.

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And so *nota*, when the reversion doth depend upon a frank-tenement, it sufficeth that the tenant of the frank-tenement do attorn, although he be not the person who presently is to be charged, as it is in *Finch's book*, fo. 42b. And this case is vouched in 9 Co. 135 a. thus, if lands be let to a man for term of years, the remainder to another for term of life, and after the lessor doth grant over the reversion, and he in the remainder for life doth attorn, this is a good attornment, and shall bind the lessee for years, without any attornment made by himself; for the other was tenant of the freehold, and at the common law the tenant for years was subject and under the power of the tenant of the freehold; for he would not falsify a recovery at the common law against the tenant of the freehold because he had but a chattel.

He in the remainder may surrender, *Perk. s. 605*, notwithstanding the lease for years. 14 H. 7. 3.

§ 572. And it is to be understood, that where a lease for years or for life, or a gift in tail, is made to any man, reserving to such lessor or donor a certain rent, &c. if such lessor or donor grant his reversion to another, and the tenant of the land attorn, the rent passeth to the grantee, although that in the deed of the grant of the reversion no mention be made of the rent, for that the rent is incident to the reversion in such case, and not *è converso*, &c. For if a man will grant the rent in such case to another, reserving to him the reversion of the land, albeit the tenant attorn to the grantee, this shall be but a rent-seck, &c.

And see sect. 228, 229, according, and observe the section; for thereby Littleton did intend, that the rent reserved was *durante termino*, in which case the rent is incident to the reversion. But if a man make a lease for years, or for life, or a gift in tail, reserving rent to him without expressing these words, or reserving, to him and to his heirs, the rent is not payable beyond the express words of reservation. *Plowd.* 171 a. 5 *Co.* 112 a. 27 *H.* 8. 19 a.

§ 573. Also, if a man let land to another for his life, and after he confirm by his deed the estate of the tenant for life, the remainder to another in fee, and the tenant for life accepteth the deed, then is the remainder *in fact* in him to whom the remainder is given or limited by the same deed. For by the acceptance of the tenant for life of the deed, this is an agreement of him, and so an attornment in law. But yet he in the remainder shall not have any action of waste, nor other benefit by such remainder, unless that he hath the said deed in hand, whereby the remainder was entailed or granted to him. And because that in such case the tenant for life peradventure will retain the deed to him, to this intent, that he in the remainder should not have any action of waste against him, for that he cannot come to have the deed in his possession, it will be a good and sure thing in such case for him in the remainder, that a deed indented be made by him which will make such confirmation, and the remainder over, &c. and that he which maketh such confirmation deliver one part of the indenture to the tenant for life, and the other part to him that shall have the remainder. And then he by shewing of that part of the indenture may have an action of waste against the tenant for life, and all other advantages that he in the remainder may have in such a case.

But *vide* the *Doct. et Stud.* in the second dialogue, fo. 94, that if a man do let for life, and after do confirm the estate of the lessee, the remainder [over] in fee, [this] is a void remainder, because it can-



not commence with the making of the estate for (1) life. But when a man doth let for the term of another man's life, and after doth confirm the estate of the tenant of the land for term of his own life, the remainder over in fee, this is a good remainder; for there the estate in the land is enlarged, and yet there are not words of gift in the grant. *Bro. tit. Done*, 45. *et Estates*, 8, according. And to this effect Pollard, Serjeant, doth argue in *Plowd. fo. 25 b*, thus, to the making and perfecting of a remainder it is necessary that the particular estate be made, and commence, at the same time when the remainder doth begin, and if the lessor doth confirm the estate of his tenant for years, the remainder in fee, this remainder is void, because the estate for years was made before the remainder in fee, and not at that time of the remainder made; and he shall not take it as a grant of [the] reversion, because he is not party to the deed. So if the lessor disseise his tenant for life, and after makes a new lease to him for life, the remainder [in fee, this remainder] is void; because the tenant for life is remitted to his estate, which was long time before the remainder appointed; so the estate precedent was not made at the time of the remainder, and therefore the remainder is void. So if the heir do endow his mother, the remainder in fee, this remainder is void, although livery and seisin is made unto the wife; because that the dower hath relation unto the death of the husband. Nevertheless Dyer, Chief Justice, doth vouch this case in *Plowd. fo. 160 a*, to the same effect as Littleton in this place hath set it down; *quare legem*, for I have heard some good students say, that this confirmation shall be good by way of grant of the reversion, and attornment of the tenant by the acceptance of the deed; for they say, that many times one word shall be taken for another, *ut res magis valeat quam pereat*; and others are of opinion, that it shall be good by way of remainder, as Littleton hath set it down; for they do take a diversity between particular estates made by the party, and those which are made by the law, as tenant in dower, tenant by the curtesy.

Besides the principal case here are two things observed: 1. when a man will take benefit of a deed or conveyance made to another man, he must be sure to procure the said deed or writing into his

(1) This passage is conformable to the MS. The words seem to bear the reverse meaning from that intended: in the Doctor and Student the reason is thus

stated, "for by the law there can no remainder depend upon an estate, but that the same estate beginneth at the same time that the remainder doth."—*Ed.*

hands, ready to shew forth in court, otherwise he shall not have the advantage thereby; *oportet ut res certa deducatur in judicium*. Sect. 375, 376, 377, *accordat*, and the reason of the law wherefore deeds pleaded in court shall be *monstrante*. The other thing observable in this case is, the special use which the parties may have by a deed indented, other than they may have by a deed poll, of which you may read more, sect. 370, *et seq.*

§ 574. Also, if two joint-tenants be, who let their land to another for term of life, rendering to them and to their heirs a certain yearly rent; in this case if one of the joint-tenants in the reversion release to the other joint-tenant in the same reversion, this release is good, and he to whom the release is made shall have only the rent of the tenant for life, and shall only have a writ of waste against him, although he never attorned by force of such release, &c. And the reason is, for the privity which once was between the tenant for life and them in the reversion.

And according to this is 5 E. 4. 1. *Nota*, if joint-tenants be of a reversion, and one of them do release to his joint-companion, it is good, because of the privity. *Releases, in Fitz. 43. 35 E. 3. according: and in 28 H. 6. [2] b, by Danby.*

§ 575. In the same manner, and for the same cause is it, where a man letteth land to another for life, the remainder to another for life, reserving the reversion to the lessor; in this case if he in the reversion releaseth to him in the remainder and to his heirs all his right, &c. then he in the remainder hath a fee, &c. and he shall have a writ of waste against the tenant for life without any attornment of him, &c.

And it is an attornment in law. And in 5 Co. 76 b, it is resolved, that if tenant for life, the remainder for life, be, the re-

mainder in fee, the first tenant for life doth commit waste, and after he in the remainder for life dieth, now [he in] the remainder in fee shall have a writ of waste, for that waste which was done in the life-time of the tenant for life; for the mesne estate, which was the impediment, is now removed; *remoto impedimento emergit actio*; and so it was remembered in 2 Co. 92 b. *Perk.* 619.

§ 576. Also, if a man let lands or tenements to another for term of years, and after he oust his termor, and thereof enfeof another in fee, and after the tenant for years enter upon the feoffee, claiming his term, &c. and after doth waste; in this case the feoffee shall have by law a writ of waste against him, and yet he did not attorn unto him. And the cause is, as I suppose, for that he which hath right to have lands or tenements for years, or otherwise, should not by law be misconusant of the feoffments which were made of and upon the same lands, &c. And in as much as by such feoffment the tenant for years was put out of his possession, and by his entry he caused the reversion to be to him to whom the feoffment was made, this is a good attornment; for he to whom the feoffment was made, had no reversion before the tenant for years had entered upon him, for that he was in possession in his demesne as of fee, and by the entry of the tenant for years, he hath but a reversion, which is by the act of the tenant for years, *scil.* by his entry, &c.

And according *nota* the case in 6 Co. fo. 69 a, b; for he who claimeth by the feoffment hath now by the re-entry of the lessee, but a reversion in the land, and hath not any means to make the particular tenant to attorn; in which case the law saith, that such an attornment is sufficient, *quod remedio destituitur ipsd. re valet, si culpa absit.* 6 Co. 68 a. And the law is grounded upon great equity and reason in this point; for peradventure the feoffee being a purchaser and a stranger, did know nothing of the lease, or if he did know it, he thought it was void, and defeasible. God forbid, if after the lessee hath evicted, or lawfully taken the possession from him, (which he thought to enjoy), *quod afflictio adderetur afflictio*;

that is, to lose the possession, and also to be without remedy for the rent reserved, (which the lessee [enjoying the land in conscience ought to pay] or for waste, (which the lessee] is prohibited to do by the law;) and Coke, Chief Justice, said, that whether the eviction be by entry, or by action by the lessee, the reversion doth remain in the feoffee, and he may avow and have an action of waste, against the opinion of Ashton, in 34 H. 6. fo. 6b. *Vide Dyer*, 18 b. 33 a, b. and 2 Co. 32 a. *Dyer*, 122 b. And *nota*, *ibidem*, and in 6 Co. 68 b, that if the cognizee by fine of a reversion before attornment do bargain and sell the reversion by deed indented and inrolled, that such a bargainee shall not avow, or have an action of waste, without attornment. *Lege seq.*

But *nota*, in 5 Co. 113 a, et b, by Popham, Chief Justice, the lessee, as Littleton saith, shall not be by the law misconusant of the feoffments made upon the same lands; this is to be understood as unto distresses, action of debt, or action of waste, in which cases the law doth compel the feoffee in his avowry and count to give notice. But Littleton is not to be understood, as unto the demand of rent, to have advantage of a condition without notice thereof given: and Littleton saith, in such case the feoffee, after regress by the lessee made, shall have an action of waste, but neither Littleton nor any other book in the law, doth speak of demand or entry upon a condition broken. *Read the book.*

And thus it is in 2 Co. 68 b, true it is, that to every attornment true notice of the grant is requisite; but it is to be observed, that there is notice expressed, and notice in law; for in some cases the law doth imply notice, without any express notice given by any person; as in this case, if he in the reversion do put out his lessee for life, and do make a feoffment in fee, and the lessee do re-enter, this is a good attornment; yet peradventure he had no notice, neither of the feoffment, nor of the estate given by the feoffment. And Littleton hereof [giveth] two reasons; first, because, the lessee by the law shall not be misconusant (*nota*, the law doth imply notice) of the feoffments which were made of and upon the same land. 2dly. By his re-entry, he doth cause the reversion to be unto him, to whom the feoffment was made, who before was seised in demesne, and had not any reversion before. And with Littleton doth agree all the court in 9 H. 6. fo. 16, and that the agreement there pleaded of the lessee upon his re-entry was not material; for without it, the justices were agreed, that the reversion and the rent were in the feoffee, and 18 E. 3. *tit. Feoffments et Facts*, 62, ac-

*cordova, by Wilby, et omnes.* And though *prima facie* in 2 H. 5. fo. 4, the court did think that this was no attornment, yet after in 5 H. 5. fo. 12, it is adjudged, that the rent is a good attornment, and that an action of waste brought by the feoffee was (1) maintainable. 44 E. 3. fo. 30 b. et 34 H. 6. fo. 6 b, according. And there it is said, if the lessee for life do recover in an assise against the feoffee, that this shall not be an attornment (2). Observe, Littleton in this case doth put his case of a lessee for years, who was expelled by the feoffment of him in the reversion, between whom there was privity; for if he in the reversion had granted over his reversion, he might attorn. And in 6 Co. 69 a, it is further resolved, if lessee for fifty years do make a lease for ten years, in which case, if the reversion had been granted over, the lessee for ten years could not attorn, for want of privity; yet when they [in] reversion do eject the second lessee, and thereof do make a feoffment, that by the regress of the second lessee, those in the reversion by force of the feoffment shall avow for the rent, and that for divers reasons, which *nota bene in librum, ibidem.*

It is not impertinent here to remember, that Littleton, section 567 (3), saith, *in fine*, that after a lease made for years, or for life, the lessor or he in the reversion cannot enter upon the lessee without wrong and injury done to his lessee; for which wrong and injury the lessee may have by the law sufficient recompence, if he will. For in action of debt if the lessor do count that he did let four acres of land to the lessee for certain term reserving a certain rent, it is a good plea for the lessee to say that the lessor hath entered into one acre; for the rent reserved was one entire rent, and he by his entry upon the lessee, which is his own act, hath extinguished his whole rent, *quod fuit concessum* by all the justices. 21 E. 4. 29 a. *Et vide* 9 Co. 135 a, according. 9 E. 4. 1 a. et vide in 3 Co. 22 b.

And observe the case in 2 Co. 31 b. a lease of a house was made for years, and of a close called Reynolds, and of divers other lands in Dale, which close called Reynolds was inclosed and severed by itself; and after the lessee being within the house, or within any

(1) "Was not maintainable," in MS.—*Ed.*

(2) "Some do hold, that in that case if the lessee for life do recover in an assise, this is no attornment, because he came to it by course of law, and not by his volun-

tary act. And yet in that case, as in the case of the fine, the state of the reversion is in the feoffee." Co. Lit. 319 a.—*Ed.*

(3) *Quare*, in what section of Littleton are these words to be found?—*Ed.*

other part of the land demised, the lessor did enter into the close, and made a feoffment of the house, and of all the lands so demised, and did make livery in the close, or any other parcel, the lessee continuing in the said house, or in any part of the demise, and not expelled out of it, and after the lessee doth re-enter in the said close, if this were a good feoffment and livery of seisin of the said close, the lessee, nor any other for him, being upon the close, where the livery and seisin was made, was the doubt. And it was adjudged that the livery and seisin was void, as well for the close as for the house, and all other lands so demised. See the book at large for the reason and arguments herein.

§ 577. The same law is, as it seemeth, where lease is made for life, saving the reversion to the lessor, if the lessor disseise the lessee, and make a feoffment in fee, if the tenant for life enter and make waste, the feoffee shall have a writ of waste without any other attornment, *causâ quâ suprâ*, &c.

*Nota*, in 5 Co. 113 a, the difference between an attornment in law (as in this case) and an express attornment. *Vide sect. 580.*

§ 578. Also, if a lease be made for life, the remainder to another in tail, the remainder over to the right heirs of the tenant for life; in this case, if the tenant for life grant his remainder in fee to another by his deed, this remainder maintainant passeth by the deed without any attornment, &c. for that if any ought to attorn in this case, it should be the tenant for life, and in vain it were that he should attorn upon his own grant, &c.

*Nota*, in this case, that he to whom the estate for life is made hath fee presently in some respects, as it is proved in 5 E. 4. fo. 2 b. *Nota*, if lands be let for term of life, the remainder in tail, the remainder to the heirs of the tenant for life, the tenant for life doth grant a rent-charge, and dieth, the tenant in tail dieth, he that is

heir to the tenant for life, shall hold it charged; but the wife of the tenant for life in that case shall not be endowed, if he die during the estate tail in force. 46 E. 3. 16, *by Finchden, b.* he in remainder in tail may have a writ of waste against tenant for life, and tenant for life may grant the reversion, and thereby his estate doth not pass by it, as appeareth.

§ 579. Also, if there be lord and tenant, and the tenant holdeth of the lord by certain rent and knight's service, if the lord grant the services of his tenant by fine, the services are presently in the grantee by force of the fine; but yet the lord may not distrain for any parcel of the services, without attornment: but if the tenant dieth, his heir within age, the lord shall have the wardship of the body of the heir, and of his lands, &c. albeit he never attorned, because that the seignory was in the grantee presently by force of the fine. And also in such case, if the tenant die without heir, the lord shall have the tenancy by way of escheat.

§ 580. In the same manner it is, if a man grant the reversion of his tenant for life to another by fine, the reversion maintainment passeth to the grantee by force of the fine, but the grantee shall never have an action of waste without attornment, &c.

§ 581. But yet if the tenant for life alieneth in fee, the grantee may enter, &c. because the reversion was in him by force of the fine, and such alienation was to his disheritance.

§ 582. But in this case, where the lord granteth the services of his tenant by fine, if the tenant die, his heir being of full age, the grantee by the fine shall not have relief, nor shall ever distrain for relief, unless that he hath the attornment of the tenant that dieth; for of such a thing which lieth in distress, whereupon the writ of replevin is sued, &c. a man must and ought to avow the taking good and rightful, &c. and there there ought to be an attornment of the tenant, although the grant of such a thing be by fine: but to have the wardship of the lands or tenements so holden during the nonage of the heir, or to have them by way of escheat, there needs no distress, &c. but an entry into the land by force of the right of the

seignory, which the grantee hath by force of the fine, &c. *Sic vide diversitatem, &c.*

§ 583. Also, if there be lord, mesne, and tenant, and the mesne grant by fine the services of his tenant to another in fee, and after the grantee die without heir, now the services of the mesnalty shall come and escheat to the lord paramount by way of escheat; and if afterwards the services of the mesnalty be behind, in this case he which was lord paramount may distrain the tenant, notwithstanding that the tenant did never attorn: and the cause is, for that the mesnalty was in deed in the grantee by force of the said fine, and the lord paramount may avow upon the grantee, because in deed he was his tenant, albeit he shall not be compelled to this, &c. But if the grantor in this case had died without heir in the life of the grantee, then he should be compelled to avow upon the grantee; and also in as much the lord paramount doth not claim the mesnalty by force of the grant made by fine levied by the mesne, but by virtue of his seignory paramount, viz. by way of escheat, he shall avow upon the tenant for the services which the mesne had, &c. albeit that the tenant did never attorn.

§ 584. In the same manner it is, where the reversion of a tenant for life is granted by fine to another in fee, and the grantee afterwards dieth without heir, now the lord hath the reversion by way of escheat; and if after the tenant maketh waste, the lord shall have a writ of waste against him, notwithstanding that he never attorned, *causâ quâ suprâ*. But where a man claimeth by force of the grant made by the fine, *scil.* as heir, or as assignee, &c. there he shall not distrain nor avow, nor have an action of waste, &c. without attornment.

*Nota*, in these cases, the effect and operation of a grant of a reversion by fine, with or without attornment. And according see in 5 Co. 113 a, if the cognizee of a reversion by fine die before any attornment without heir, by which the estate, which he had, doth escheat to the lord, he in that case may distrain without attornment; and the reason is, because the lord by escheat hath lost his seignory,



and also he doth not claim as an heir or assignee to the cognizee, but by virtue of his seignory paramount. But before attornment made to the grantee of the reversion by fine, there wanteth privity, so that he cannot distrain for the rent, or have an action of waste, neither can such a cognizee take benefit of a condition by the statute 32 H. 8. cap. 34. And in *Co. ibidem*, nota the diversity, when express attornment is made to the grantee of the reversion by fine, and of attornment in law.

§ 585. Also, in ancient boroughs and cities, where land and tenements within the same boroughs and cities are devisable by testament by custom and use, &c. if in such borough or city a man be seised of a rent-service, or of a rent-charge, and deviseth such rent or service to another by his testament and dieth; in this case, he to whom such devise is made, may distrain the tenant for the rent or service arrear, although the tenant did never attorn.

Concerning the custom of the devising burgage lands, read section 167.

§ 586. In the same manner is it, where a man letteth such tenements devisable to another for life, or for years, and deviseth the reversion by his testament to another in fee, or in fee tail, and dieth, and after the tenant commits waste, he to whom the devise was made shall have a writ of waste, although the tenant doth never attorn. And the reason is, for that the will of the devisor made by his testament shall be performed according to the intent of the devisor; and if the effect of this should lie upon the attornment of the tenant, then perchance the tenant would never attorn, and then the will of the devisor should never be performed, &c. and for this the devisee shall distrain, &c. or he shall have an action of waste, &c. without attornment. For if a man deviseth such tenements to another by his testament, *habendum sibi in perpetuum*, and dieth, and the devisee enter, he hath a fee simple *causâ quâ suprâ*; yet if a deed of feoffment had been made to him by the devisor of the same tenements, *habendum sibi in perpetuum*, and

livery of seisin were made upon this, he should have an estate but for term of his life.

And upon this reason, viz. that the will of the testator may be performed, is the case in 1 Co. 101 *a*, the rule of the law is, that a remainder cannot stand without a particular estate, and yet the book is agreed 37 H. 6. 36, if a man devise lands for life [the remainder in fee, and the tenant for life] refuseth, yet the remainder is good. And *nota* 3 Co. 20 *b*, *et seq.* and in 1 Co. fo. 85 *b*, for construction of wills, this rule was taken by the justices, that such estate which cannot by the rules of the common law be conveyed by act executed in his life-time by advice of learned counsel in law, such an estate cannot be devised by the last will of a man, who is presumed in law to be *inops consilii*. As if a man devise lands to one for ever, then he hath fee simple; for such an estate may be conveyed by an act executed. But if he will devise further, that if the devisee do not such an act, that another shall have the land to him and to his heirs, this is void; for such an estate, if it had been by act executed, is void, *et sic de cæteris*. But *nota* in 8 Co. 96 *a*, in divers cases a man by his will may create an interest, which by grant or conveyance at the common law he cannot create in his life-time. *Vide librum*. *Vide* 6 Co. 16 *a*, 17 *a*. And *nota* in 5 Co. 68, no averment may be taken against the express words of a will; so *nota* the intent of the devisor, and so far as his intent doth stand with the rules of the law, shall be taken; whereof see in *Finch*, fo. 55 *b*, in *fine*, *et Dyer*, 357.

§ 587. Also, if a man be seised of a manor which is parcel in demesne and parcel in service, and is thereof disseised, but the tenants which hold of the manor do never attorn to the disseisor; in this case, albeit the disseisor dieth seised, and his heir is in by descent, &c. yet may the disseisee distrain for the rent behind, and have the services, &c. But if the tenants come to the disseisor and say, "we become your tenants," &c. or make to him some other attornment, &c. and after the disseisor dieth seised, then the disseisee cannot distrain for the rent, &c. for that all the manor descendeth to the heir of the disseisor, &c.

§ 588. But if one holdeth of me by rent service, which is a service in gross, and not by reason of my manor, and another that hath no right, claimeth the rent, and receives and taketh the same rent of my tenant by coercion of distress, or by other form, and disseiseth me by such taking of the rent; albeit such disseisor dieth so seised in taking of the rent, yet after his death I may well distrain the tenant for the rent which was behind before the decease of the disseisor, and also after his decease. And the cause is, for that such disseisor is not my disseisor, but at my election and will. For albeit he taketh the rent of my tenant, &c. yet I may at all times distrain my tenant for the rent behind, so as it is to me but as if I will suffer the tenant to be so long time behind in payment of the same rent unto me, &c.

§ 589. For the payment of my tenant to another to whom he ought not to pay, is no disseisin to me, nor shall oust me of my rent without my will and election, &c. For although I may have an assise against such pernor, yet this is at my election, whether I will take him as my disseisor, or no. So such descents of rents in gross shall not oust the lord of his distress, but at any time he may well distrain for the rent behind, &c. And in this case if after the distress of him which so wrongfully took the rent, I grant by my deed the service to another, and the tenant attorn, this is good enough, and the service by such grant and attornment are presently in the grantee, &c. But otherwise it is where the rent is parcel of a manor, and the disseisor dieth seised of the whole manor, as in the case next before is said, &c.

By this is taught, if a man be disseised of a manor, which doth consist of demesnes and services, before attornment the disseisee may distrain for the rent behind, and for the service, though he have not entered into the demesne lands, yea, though the disseisor die seised of the demesnes; and it seemeth that Littleton's meaning is, that during the life of the disseisor, although the tenants have attorned to him, the disseisee may distrain for the rents and service due, because the disseisee cannot be disseised of the rents or services, but at his will and election. For if he do bring his assise against

the disseisor, thereby he sheweth his election, and he is out of the possession of the rent and services; but if he do distrain the tenements, that doth prove his first seisin and possession of his rent and services to be continued in him still.

But Brian's opinion was in 6 *H. 7. fo. 14a*, and afterwards in 12 *H. 7. 2, in Kielway*, when he was Chief Justice; if I be disseised of a manor, and the tenants do pay the rents to the disseisor, and after I do re-enter, I shall not have the rent again, which they have paid to my disseisor, but the disseisor shall answer for all in trespass or assise; but Keble and Vavisor said, if a disseisor enter into a manor, and the tenants do pay once, they may refuse another time; and this seemeth reason; for otherwise the disseisee may cause them to pay again, for the tenants might have avoided the disseisor; but in cases when the tenants cannot avoid him, as a recovery be executed against the lord: and so appeareth a plain diversity, and the lord hath his sufficient remedy in that case; for by his reversal of such erroneous recovery, he shall be restored *una cum exitibus*, by the hands of him who so did erroneously recover; but Littleton is good law in this section, that after attornment and a descent, the disseisee of the manor cannot distrain for the reason therein expressed.

§ 590. Also, if I be seised of a manor, parcel in demesne, and parcel in service, and I give certain acres of the land parcel of the demesne of the same manor, to another in tail, yielding to me and to my heirs a certain rent, &c. if in this case I be disseised of the manor, and all the tenants attorn and pay their rents to the disseisor, and also the said tenant in tail pay the rent by me reserved, to the disseisor, and after the disseisor dieth seised, &c. and his heir enter, and is in by descent, yet in this case I may well distrain the tenant in tail and his heirs, for the rent by me reserved upon the gift, *scil.* as well for the rent being behind before the descent to the heir of the disseisor, as also for the rent which happeneth to be behind after the same descent, notwithstanding such dying seised of the disseisor, &c. And the reason is, for that when a man giveth lands in tail, saving the reversion to himself, and he upon the said gift reserveth to himself a rent or other services, all the rent and services are incident to the reversion; and when a man hath a re-

version he cannot be ousted of his reversion by the act of a stranger, unless that the tenant be ousted of his estate and possession, &c. For as long as the tenant in tail and his heirs continue their possession by force of my gift, so long is the reversion in me and in my heirs; and in as much as the rent and services reserved upon such gift be incident and depending upon the reversion, whosoever hath the reversion, shall have the same rent and services, &c.

§ 591. In the same manner is it, where I let parcel of the demesnes of the manor to another for term of life, or for term of years, rendering to me a certain rent, &c. albeit I be disseised of the manor, &c. and the disseisor die seized, &c. and his heir be in by descent, yet I may distrain for the rent arrear *ut supra*, notwithstanding such descent: for when a man hath made such a gift in tail, or such a lease for life or for years of parcel of the demesnes of a manor, &c. saving the reversion to such donor or lessor, &c. and after he is disseised of the manor, &c. such reversion after such disseisin is severed from the manor in deed, though it be not severed in right. And so thou mayest see (my son) a diversity, where there is a manor parcel in demesne and parcel in services, which services are parcel of the same manor not incident to any reversion, &c. and where they are incident to the reversion, &c.

*Nota*, these two last cases; the reason is, when a man hath made such a gift in tail, or such a lease for term of life, or for term of years, of parcel of the demesnes of a manor, saving the reversion to the donor or lessor, &c. and after he is disseised of the manor, &c. such a reversion after such disseisin is severed from the manor *in fait*, although it be not severed *in droit*. And so you may see the diversity, where there is a manor parcel in demesne, and parcel in services, the which services be parcel of the same manor not incident to any reversion, &c. and where they be incident to a reversion. *Dyer, 94 b. Vide 11 Co. 47 b. 49 b.*

If one make a lease for life of a manor, except twenty acres of it, those twenty acres cannot be parcel of the reversion. For if the reversion of the manor be granted, those twenty acres in possession pass not, because they are not parcel of the manor, but are severed for the time. But if a lease be of twenty acres parcel of [a manor,

yet a reversion of them is parcel of the manor, for a reversion] may be parcel of a thing in possession, or appendant to a thing in possession; but a possession cannot be parcel [of] or appendant to a thing in reversion; and so is the diversity *Plowd.* 103 *b* and 104 *b*. *Dyer*, 103 *b*. But Littleton saith, that such a reversion after such disseisin, is severed from the manor *in fait*, though it be not severed *in droit*. *Nota; vide* 38 *H.* 6. *fo.* 37, by Prisott: and in *Plowd.* 422 *b*, it is thus said; Littleton doth teach us, that if one do make a gift in tail, or a lease for life, of parcel of a manor, during those estates the land is not parcel of the manor. And therefore Littleton also saith in this section, that when a man hath a reversion, he cannot be put out from his reversion by the act of a stranger, unless the tenant be also put out of his estate in possession (1). *Vide Dyer*, 350 *a*. 7 *H.* 7. 8 *a*, *in fine*. *Kineux*.

And to end this chapter of attornment, it is to be observed, that though the ceremonies of attornment in the case aforesaid, where the grant is made by deed, be so necessary to the perfection thereof, that the grant without it doth take no effect; yet the law hath not provided any remedy or means to compel the tenant to attorn in that case. *Old N. B.* 170, &c. *Kitchin*, 72 *b*. And in case of a feoffment, the ceremony of livery and seisin is necessary, yet no means is to compel the feoffor to make livery. And if a bargain be made by deed indented of lands, according to the statute 27 *H.* 8. cap. 16, if the clerk do not inrol the indenture within the six months, all is void, and no remedy. Or if a surrender be made of copyhold into the hands of certain copyholders according to the custom of the manor, if they do not present it into the court according to the custom, the surrender is void: *caveat emptor*; for he at his peril is to perfect whatsoever is requisite to his assurance: 5 *Co.* 84 *a*: therefore, *ubi majus est periculum ibi cautius est agendum*. If there be lord and tenant, and the tenant hold of the lord by certain service and rent, if the lord do grant the service of his tenant by fine, the service be presently in the grantee by force of the fine; but yet he cannot distrain for any part of the service without attornment: and in the same manner if a man do grant the reversion of his tenant for term of life unto another by fine, the reversion doth pass presently to the grantee by force of the fine; but the grantee shall not have his action of waste without attornment. But remedies in these cases of fines [which] are given by the law in the first case is, by

(1) See *Co. Lit.* 324 *b*, *et seq.*—*Ed.*

writ called *per quæ servitia*, and the last by a *quid juris clamat*. But *caveat emptor* also in this case of fines; for those writs must be pursued after the cognizance, and before the ingrossing of the fine; for after the fine ingrossed, he cannot sue those writs to compel the tenant to attorn; neither can he make avowry, or punish waste, without attornment. *F. N. B. 147 a. Plowd. 431 b, and 3 Co. 86 a.* Howbeit, *vide sect. 564*, if there be lord and tenant, and the tenant do hold of his lord by divers manner of services, and the lord doth grant those services to another [by] fine; if the grantee do sue a *scire facias* out of the same fine for any parcel of the services, and have judgment to recover, this judgment is a good attornment in the law for all the services. But if a man do alien his manor by deed indented of bargain and sale, and inrol it according to the statute (*ut oportet*); when any estate of freehold doth pass, this is good without any attornment, and the alienee may distrain for the services; and the same law is of a reversion so granted. *Brooke, Attornment, 29.*

And if an estate or interest for years be only conveyed by bargain and sale, there needeth no inrolment, for the statute of 27 H. 8. cap. 10, of uses, doth execute the possession to it: and the statute of 27 H. 8. cap. 16, of inrolments, doth not extend to it, because no estate of freehold doth pass; also the use and interest doth pass in manner *uno statu*. *2 Co. 36 a. 8 Co. 94 a.*

And in 6 Co. 68 a, it is resolved, that if a man be seised of a manor, part of which is in lease for lives, and part in lease for years, and he do levy a fine to A. to the use of B. in tail, with divers remainders over; that in this case B. may avow for rent, or may have an action of waste without attornment; for the rule is *quod remedio destituitur ipsâ re valet, si culpa absit*. As the lord by escheat, or in mortmain, or of a villein, who claimeth a reversion, by the claim the law doth vest the reversion in him, and he hath no means to compel the tenant to attorn; and therefore he shall avow, and have an action of waste without attornment. The same law of letters patent, and of a devise of a reversion, as appeareth 34 H. 6, for in all these cases *culpa abest*. *6 Co. 68 a, et b.*

*Nota*, a good resolution for all conveyances upon consideration of marriage, or otherwise, upon limitation of uses upon fines and recoveries, &c. and observe by this resolution the great facility and safety for them to whose use they are levied; which is also good for the benefit of the commonwealth, that particular estates are not punishable of waste, nor those in reversion barred from recovering

their rents, which in all equity and reason are due to them, and no inconvenience to the particular tenants; for upon execution of estates by the statute of 27 H. 8, of Uses, as upon covenants in consideration of blood, or upon bargain and sale by deed indented and enrolled, *et similia*, there needs no attornment. *Co. ibid.*

### LIB. III. CAP. XI.—DISCONTINUANCE.

§ 592. Discontinuance is an ancient word in the law, and hath divers significations, &c. But as to one intent it hath this signification, viz. where a man hath aliened to another certain lands and tenements, and dieth, and another hath right to have the same lands or tenements, but he may not enter into them because of such an alienation, &c.

Discontinuance and continuance are *opposita*; and therefore Coke, in his preface to his first part, saith, as I allow not to the student any discontinuance at all, for he shall lose more in a month than he shall recover in many, so do I commend perseverance to all, as to all other means an inseparable incident. And as to the purpose in hand, discontinuance [which] signifieth nothing else, but an interruption or breaking of possession, is this, that a man may not enter upon his own land or tenements aliened to another, whatsoever his right be unto it, but he must bring his writ, and seek to recover again possession by law: and the reason hereof is, for the favor which the law doth bear to the livery and seisin, and the estates made thereby; because it is made publicly and notorious, and in the ancient time it was the common and usual assurance of the land. 5 Co. 85 b. And therefore the alienee by such lawful conveyance, shall not be removed from his peaceable possession therein, by the only entry of him that hath right, but only by action and lawful trial of the demandant's right; for till then, the presumption of the law is, that the alienee hath the only right. The particular cases and examples to exemplify this, do immediately follow. And in Finch's second book, fo. 50 a, discontinuance is, when by making of a more greater and large estate than he may, he doth divest the inheritance out of another man: as if tenant for life, or lessee for years, do make a feoffment, by this the reversion depending upon



this estate is divested; and so it is, if tenant in tail do make a feoffment, or if he be tenant in fee simple in another's right, this doth take away the entry of all others, who have title after his death; as where a husband seised but in right of his wife, a dean sole seised in right of his deanery, a dean and chapter, guardian and chaplains, mayor and commonalty, seised of lands in right of the corporation, do make a discontinuance.

§ 593. As if an abbot be seised of certain lands or tenements in fee, and alieneth the same lands or tenements to another in fee, or in fee tail, or for term of life, and after the abbot dieth, his successor cannot enter into the said lands or tenements, albeit he hath right to have them as in right of his house, but he is put to his action to recover the same lands or tenements, which is called a writ, *breve de ingressu sine assensu capituli*, &c.

This section is an example of the general rule afore, and of this writ *de ingressu sine assensu capituli*, read in *Fitz. N. B. fo. 194 I.* For the prudence of the sages of the law is to be observed, that no sole corporation was at any time trusted with the disposition of their possessions, to bind their successor's right; for in that case the consent of others is requisite, as bishop of the dean and chapter, the abbot the consent of his convent, the parson the consent of the patron and ordinary, *et sic de cæteris*. 3 Co. 75 a. For it had not been reasonable to impose so great charge, or to repose such confidence in any sole person, or to give power to one person only to prejudice his successor so far: but as unto the possession only, the abbot sole might prejudice his successors, *ut patet*.

§ 594. Also, if a man be seised of land as in right of his wife, &c. and thereof enfeoff another, &c. and dieth, the wife may not enter, but is put to her action, the which is called *cui in vitâ*, &c.

This is also another example of the rule before; for when a man is seised of lands, as in right of his wife only, and thereof doth

enfeoff another, he doth thereby make a greater estate to the feoffee, than he hath in truth, or may lawfully do; yet his wife, after the death of her husband, cannot enter by the common law; but she is put to her action, because of the livery and seisin, as before is said: and the action which the common law did give her in this case is a writ called *cui in vitâ contradicere non potuit*, which read in *Fitz. N. B. fo. 193.*

But by the statute made 32 H. 8. cap. 28, the law is altered in this point from that it was when Littleton did make his book, which statute read, and upon it note [8] *Co. 72*; and also one other statute, made *anno* 34 H. 8. cap. 20.

§ 595. Also, if tenant in tail of certain land thereof enfeoff another, &c. and hath issue and dieth, his issue may not enter into the land, albeit he hath title and right to this, but is put to his action, which is called a *formedon in le discender*, &c.

This is another example to explain the said rule; for though the statute (by which the estate tail was made) be *si finis super hujusmodi tenemento imposterum levetur ipso jure sit nullus*; yet the justices have well understood those words, and the intent of the makers of the statute to be thus, viz. that the inheritance of the tenant in tail shall not be bound by the feoffment or other act of the tenant in tail in possession (though it be by fine), *quoad* the right in them; but as unto the possession, it is a discontinuance. *Plowd. 57 b.* And *Fitz. N. B. 212*, you may read at large this writ of *formedon in discender*. 8 *Co. 72 a*, tenants in tail are of the husband and the wife, the husband doth make a feoffment and dieth, the wife surviving dieth without entry, this was at the common law a discontinuance to the issue; for the issue must claim as heir of the two bodies individually, and as heir unto one only the heir could not inherit, and by consequence he cannot enter; for his entry must ensue his title [and] his action (1); which is proved in the writ of *formedon* in the Register Original, *fo. 258 b.* *Vide plus in libro.*

(1) See *Co. Lit. 326 b.*—*Ed.*

§ 596. Also, if there be tenant in tail, the reversion being to the donor and his heirs, if the tenant make a feoffment, &c. and die without issue, he in the reversion cannot enter, but is put to his action of *formedon in le reverter*.

§ 597. In the same manner is it, where tenant in tail is seised of certain land whereof the remainder is to another in tail, or to another in fee. If the tenant in tail alien in fee, or in fee tail, and after die without issue, they in the remainder may not enter, but are put to their writ of *formedon* in the remainder, &c. and for that that by force of such feoffments and alienations in the cases aforesaid, and the like cases, they that have title and right after the death of such a feoffor or alienor may not enter, but are put to their actions, *ut supra*; and for this cause such feoffments and alienations are called discontinuances.

And the reason of all this is the favor which the law doth give to the livery and seisin (as before is said) and to the possession which the feoffee hath in the land by such conveyance; for the livery and seisin which the tenant in tail did make of the land, doth not only bar himself so that he cannot enter contrary to his own feoffment, but also all those in reversion or in remainder of his estate tail; for their estates originally were expecting and depending upon an estate tail; but when by his alienation an estate in fee did pass to his feoffee, then of necessity those estates expectant be also divested and gone till it be revested again by lawful action and trial. [After] the said statute of Westm. 2. cap. 1, there were two estates of inheritance a greater and a lesser; whereas before there was but one, and the alienation which was before that statute by him who had the estate of inheritance, and the alienation of him who now hath an estate tail, is not of one and the same force and effect *ut patet*; also this is to be observed, that by the feoffment of tenant in tail, the estate tail doth not pass out of or from the feoffor, nor is not by such feoffment in the feoffee; for none shall be tenant in tail but he only who is comprehended in the gift and in the limitation made by the donor, for *voluntas donatoris* is the warrant of estates tail.

And yet by the feoffment made by the tenant in tail, a discontinuance is wrought both to the issue in tail and to those in the reversion or remainder, as in this section appeareth: provided always,

that the rule of Littleton be observed in sect. 625; for none may discontinue the estate tail unless thereby also the reversion or remainder be discontinued; for in cases where the reversion cannot be discontinued, there the estate in tail is not discontinued; as if the king be donor in tail, this is no discontinuance to the king. *Vide in Plowd. in Walsingham's case.*

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§ 598. Also, if tenant in tail be disseised, and he release by his deed to the disseisor and to his heirs all the right which he hath in the same tenements, this is no discontinuance, for that nothing of the right passeth to the disseisor, but for term of the life of tenant in tail, which made the release, &c.

§ 599. But by the feoffment of tenant in tail, fee simple passeth by the same feoffment by force of the livery of seisin, &c.

§ 600. But by force of a release nothing shall pass but the right which he may lawfully and rightfully release, without hurt or damage to other persons who shall have right therein after his decease, &c. So there is great diversity between a feoffment of tenant in tail, and a release made by tenant in tail.

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These three cases do not extend to the rule before mentioned; for here doth appear a plain diversity betwixt a feoffment made by the tenant in tail by livery, which is public and notorious, and a release made by tenant in tail to a disseisor of all his right which is done in private; for by force of a release nothing doth pass but only the right which tenant in tail may lawfully or rightfully release without damage or hurt to other persons who have right after his decease.

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§ 601. But it is said, that if the tenant in tail in this case release to his disseisor, and bind him and his heirs to warranty, and dieth, and this warranty descend to his issue, this is a discontinuance, by reason of the warranty.

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And agreeable to Littleton is 3 Co. 85 a, and the reason there alleged is, because the estate upon which the warrant doth enure

doth continue after the death of tenant in tail. *Vide* 21 H. 7. 9a. But if tenant in tail of a rent, reversion, &c. doth grant it in fee with warranty, and dieth; now if the issue in tail doth determine his election to have it void, this is absolutely determined by his death; and by consequence the warranty also; viz. if he do distrain for the rent; but by bringing a *formedon*, whereby he doth make the grant to have continuance, then consequently the warranty doth remain; and if assets do descend, the issue shall be barred. *Co. ibid.*

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§ 602. But if a man hath issue a son by his wife, and his wife dieth, and after he taketh another wife, and tenements are given to him and to his second wife, and to the heirs of their two bodies engendered, and they have issue another son, and the second wife dieth, and after the tenant in tail is disseised, and he release to the disseisor all his right, &c. and bind him and his heirs to warranty, &c. and die, this is no discontinuance to the issue in tail by the second wife, but he may well enter, for that the warranty descendeth to his elder brother which his father had by the first wife, &c.

§ 603. In the same manner is it, where lands are descendable to the youngest son after the custom of borough English, which are entailed, &c. and the tenant in tail hath two sons, and is disseised, and he releaseth to his disseisor all his right with warranty, &c. and dieth, the younger son may enter upon the disseisor, notwithstanding the warranty, for that the warranty descendeth to the elder son; for always the warranty shall descend to him who is heir by the common law.

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By these two (1) sections it appeareth, that by the only release of tenant in tail to the disseisor, no discontinuance is wrought; but that the heir in tail, or he in the reversion, or in the remainder, may enter, and are not put to their actions. But otherwise it is if the tenant in tail do release to his disseisor, and bind him and his heirs to warranty; for then it is a discontinuance, provided always, that this warranty do descend to the heir inheritable of the estate tail (2); for

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(1) In the MS. it appears to be "By these three sections," but the numbers of the sections are not inserted, and it is evident, that what precedes applies to s. 601, and what follows to s. 604.—*Ed.*

(2) See Co. Lit. 329 a.—*Ed.*

otherwise he shall not be barred from his entry, neither by the feoffment, nor by the warranty of his ancestor. So you sec, that as livery is one of the things which the law doth specially favor for the cause before alleged, so is warranty one other favorite, because it doth extend to establish him that is ter-tenant in possession. 5 Co. 8 b.

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§ 604. Also, if an abbot be disseised, and he releaseth to the disseisor with warranty, this is no discontinuance to his successor, because nothing passeth by this release but the right which he hath during the time that he is abbot, and the warranty is expired by his privation, or by his death.

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But see before, *sect. 593*. If an abbot alien in fee, this is a discontinuance to his successor, so that he cannot enter, because of livery and seisin made by his predecessor. But in this case, if an abbot be disseised, and he do release to the disseisor, though it be with warranty, it doth not extend unto his successor, as in the last case it doth descend to the heir of the tenant in tail, who did release.

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§ 605. Also, if a man seised in the right of his wife be disseised, and he releaseth, &c. with warranty, this is no discontinuance to the wife, if she surviveth her husband, but that she may enter, &c. *Causa patet*.

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And for the same reason, if a man seised in the right of his wife is disseised, and he do release to him, and bind himself and his heirs to warranty, this is no discontinuance to the wife, if she do survive her husband, but that she may enter; because nothing doth pass by his release, but that which lawfully he may release without prejudice to any other, and also this warranty must descend unto him who is heir, which the wife is [not].

§ 606. Also, if tenant in tail of certain land letteth the same land to another for term of years, by force whereof the lessee hath thereof possession, in whose possession the tenant in tail by his deed re-

leaseth all the right that he hath in the same land, to have and to hold to the lessee and to his heirs for ever ; this is no discontinuance : but after the decease of the tenant in tail, his issue may well enter, because by such release nothing passeth but for term of the life of the tenant in tail.

§ 607. In the same manner it is, if the tenant in tail confirm the estate of the lessee for years, to have and to hold to him and to his heirs, this is no discontinuance, for that nothing passeth by such confirmation but the estate which the tenant in tail hath for term of his life, &c.

§ 608. Also, if tenant in tail after such lease grant the reversion in fee by his deed to another, and willeth that after the term ended, that the same land shall remain to the grantee and his heirs for ever, and the tenant for years attorn, this is no discontinuance. For such things which pass in such cases of tenant in tail only by way of grant, or by confirmation, or by such release, nothing can pass to make an estate to him to whom such grant, or confirmation, or release is made, but that which the tenant in tail may rightfully make, and this is but for term of his life, &c.

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The reason in these three cases is one, [as] here appeareth, viz. because such things which do pass from the tenant in tail only by way of grant, or by confirmation, or by a release, nothing can pass to make an estate unto him to whom such a grant, or confirmation, or release is made, but which the tenant in tail may rightfully make ; viz. but for term of his life ; for he is restrained by the statute of Westm. 2. cap. 1, as before appeareth. And see this case of Littleton vouched, in *Plowd.* 556 a. But by the statute 32 H. 8. c. 28, tenant in tail may make leases for three lives, or for twenty-one years, so that such leases be made in such form as by that statute is appointed : and by the construction of the statute 32 H. 8. c. 36, tenant in tail by fine levied may make leases for any longer term, as is adjudged in *Plowd.* 435.

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§ 609. For if I let land to a man for term of his life, &c. and the tenant for life letteth the same land to another for term of years, &c.

and after my tenant for life grant the reversion to another in fee, and the tenant for years attorn, in this case the grantee hath in the freehold but an estate for term of the life of his grantor, &c. and I which am in the reversion of the fee simple, may not enter by force of this grant of the reversion made by my tenant for life, for that by such grant my reversion is not discontinued, but always remains unto me, as it was before, notwithstanding such grant of the reversion made to the grantee, to him and to his heirs, &c. because nothing passed by force of such grant, but the estate which the grantor hath, &c.

§ 610. In the same manner is it, if tenant for term of life by his deed confirm the estate of his lessee for years, to have and to hold to him and his heirs, or release to his lessee and his heirs, yet the lessee for years hath an estate but for term of the life of the tenant for life, &c.

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The same law is, if the tenant for term of life do confirm by his deed the estate of his lessee for term of years, with words of fee simple; yet in *rei veritate* the lessee for term of years hath no estate but for term of his lessor's life. And observe, a release or confirmation by the lessor seised in fee simple of all his right made to his lessee for years, doth enlarge his estate in the land for term of his own life; but if the grantor were tenant in tail, then his estate is enlarged, but not for his own life, but for the life of the tenant in tail; *ratio patet*. See *Plowd.* 161 *b*. And in this, by the release or confirmation made by a particular tenant for life to his lessee for years, his estate is enlarged but for term of the life of the lessor, and not for term of the life of the lessee for years: for the greatest estate shall pass which lawfully may be conveyed, and no other.

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§ 611. But otherwise it is when tenant for life maketh a feoffment in fee, for by such a feoffment the fee simple passeth. For tenant for years may make a feoffment in fee, and by his feoffment the fee simple shall pass, and yet he had at the time of the feoffment made but an estate for term of years, &c.

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This case doth declare, which also you may see in the beginning of this chapter, a plain difference when a tenant for, &c. doth alien



his lands by feoffment and solemn livery, and when but by a release or confirmation; for not only a tenant for term of life, but a tenant for term of years, may make a feoffment in fee, and by his feoffment the fee simple doth pass; of which matter read in *Hengham, parva*, fo. 99, *aliquando contingit quod tenentes ad voluntatem vel ad terminum feoffant alios de facto, cum de jure non possunt, et tamen per eorum feoffamentum acquiritur feoffatis liberum tenementum, quod nunquam evenit per factum, [illorum] qui nullam habent tenentiam*: and the words of the statute of Westm. 2. c. 25, are, *transfertur liberum tenementum in feoffatum*.

§ 612. Also, if tenant in tail grant his land to another for term of the life of the said tenant in tail, and deliver to him seisin, &c. and after by his deed he releaseth to the tenant and to his heirs all the right which he hath in the same land; in this case the estate of the tenant of the land is not enlarged by force of such release, for that when the tenant had the estate in the land for term of the life of the tenant in tail, he had then all the right which tenant in tail could rightfully grant or release: so as by this release no right passeth, in as much as his right was gone before.

By this [re-] lease *nihil operatur* to enlarge his estate to whom it is made, and therefore by consequence it worketh no discontinuance. But in 13 II. 7. fo. 10 a, it is holden by all the justices, that by such a release the estate tail is in suspense, *quoad* the tenant in tail himself, who makes the lease (1); for thereby the lessee for life is dispunishable for waste made during the life of the tenant in tail: and see this case of Littleton vouched in *Plowd. Com. fo. 556 a*.

§ 613. Also, if tenant in tail by his deed grant to another all his estate which he hath in the tenements to him entailed, to have and to hold all his estate to the other, and to his heirs for ever, and de-

(1) So Lord Coke says, "This release is no discontinuance. But in regard of himself, this release leaveth no reversion in him, but puts the same in abeyance,

so as after this release made, he shall not have any action of waste, &c." Co. Lit, 331 a.—Ed.

liver to him seisin accordingly ; in this case the tenant to whom the alienation was made, hath no other estate but for term of the life of tenant in tail. And so it may be well proved that tenant in tail cannot grant nor alien, nor make any rightful estate of freehold to another person but for term of his own life only, &c.

And to the effect aforesaid it is, when tenant in tail doth grant *totum statum suum* to another and to his heirs. But it is to be observed in this case, that Littleton here is [not] to be understood literally, that is to say, that the grantee hath only an estate for term of life of the tenant in tail; for then the tenant in tail should have the reversion in tail, and might have an action of waste, or re-enter for a forfeiture, because of an alienation made by such a grantee. Or if tenant in tail of a reversion expectant upon an estate for years, or for life, do grant his reversion in fee simple, and the lessee do attorn, and after the particular estate doth determine, and the grantee doth make waste, or do make a feoffment, &c. that the tenant in tail might punish the waste or enter for the forfeiture. But Littleton himself is against this, *sect. 650*. So that the intent of Littleton was not that the grantee hath no other estate but for life, and that his estate shall be absolutely determined by the death of tenant in tail, but that [it] is no discontinuance; and for that the grantee hath no predurable or fixed estate, but only for the life of the tenant in tail, but that his issue after his death may determine it at his pleasure; for if the grantee in such case should have but only an estate during the life of the tenant in tail, then the wife of the grantee should not be endowed; but the contrary is adjudged in *24 E. 3. fo. 28*. *Nota* all this matter in *3 Co. 84 b*, see in *Plowd. 556*.

§ 614. For if I give land to a man in tail, saving the reversion to myself, and after the tenant in tail enfeoffeth another in fee, the feoffee hath no rightful estate in the tenements for two causes. One is, for that by such feoffment my reversion is discontinued, the which is a wrong and not a rightful act. Another cause is, if the tenant in tail dieth, and his issue bring a writ of *formedon* against the feoffee, the writ and also the declaration shall say, &c. that the feoffee by wrong him deforces, &c. *Ergo* if he deforceth him by wrong, he hath no right estate.

In the precedent section is shewed, that tenant in tail cannot grant, or alien, or make any rightful estate of the freehold to any person, but for term of his own life; for by the stat. Westm. 2. c. 1, he is restrained by such alienation to prejudice his issues, or those in the reversion or remainder, after estate in tail determined: and therefore in this section it is proved, that although a tenant in tail do make a feoffment in fee by livery and seisin, which is so much favored in law, as before appeareth, yet this was a wrong done to his heir, and to them in the reversion or remainder; for thereby the reversion and remainder is discontinued, so that after the death of the tenant in tail they may not enter, but are driven to their actions of *formedon* as [by] the case doth appear.

And observe that the proof of this assertion is drawn from the form of the original writ of *formedon*, which is in the Register, and is of great authority, as may appear by the judicious opinion of Fitzherbert, in his preface to his N. B. where he saith, that original writs are foundations whereupon the law dependeth; and Bracton, *communia brevia inter omnes pro jure generaliter observari debent.* 8 Co. 48 b. And in *Brooke, tit. Tail*, 39, it is said, if the king be tenant in tail, and by his letters patent do grant the land for life, in tail, or in fee, the king hath issue and dieth, the issue may enter; for the patent is void, because it is no discontinuance; and every discontinuance is a wrong which the king cannot do. *Plowd.* 233 a. 1 Co. 44. Observe in this section the word *deforcia*t, and *vide* sect. 674.

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§ 615. Also, if land be let to a man for term of his life, the remainder to another in tail, if he in the remainder will grant his remainder to another in fee by his deed, and the tenant for life attorn, this is no discontinuance of the remainder.

§ 616. Also, if a man hath a rent-service or rent-charge in tail, and he grant the said rent to another in fee, and the tenant attorn, this is no discontinuance, &c.

§ 617. Also, if a man be tenant in tail of an advowson in gross, or of a common in gross, if he by his deed will grant the advowson or common to another in fee, this is no discontinuance; for in such cases the grantees have no estate but for term of the life of tenant in tail that made the grant, &c.

§ 618. And note, that of such things as pass by way of grant, by deed made in the country, and without livery, there such grant

maketh no discontinuance, as in the cases aforesaid, and in other like cases, &c. And albeit such things be granted in fee, by fine levied in the king's court, &c. yet this maketh not a discontinuance, &c.

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The rule for all these cases is one, which is delivered in this last section, which note. And if the reader be desirous to know, wherefore upon the words of the statute of Westm. 2. c. 1, *de donis conditionalibus, non habeant illi quibus tenementum sic datum fuerit sub conditione alienandi*, &c. read thereof at large in 3 Co. 85 b.

§ 619. Note, if I give land to another in tail, and he letteth the same land to another for term of years, and after the lessor granteth the reversion to another in fee, and the tenant for years attorn to the grantee, and the term expireth during the life of the tenant in tail, by which the grantee enter, and after the tenant in tail hath issue and die; in this case this is no discontinuance, notwithstanding the grant be executed in the life of the tenant in tail, for that at the time of the lease made for years, no new fee simple was reserved in the lessor, but the reversion remained to him in tail, as it was before the lease made.

§ 620. But if the tenant in tail make a lease for term of the life of the lessee, &c. in this case the tenant in tail hath made a new reversion of the fee simple in him; because when he made the lease for life, &c. he discontinued the tail, &c. by force of the same lease, and also he discontinued my reversion, &c. And it behoveth that the reversion of the fee simple be in some person in such case: and it cannot be in me which am the donor, in as much as my reversion is discontinued; *ergo* the reversion of the fee ought to be in the tenant in tail, who discontinued my reversion by lease, &c. And if in this case the tenant in tail grant by his deed this reversion in fee to another, and the tenant for life attorn, &c. and after the tenant for life dieth, living the tenant in tail, and the grantee of the reversion enter, &c. in the life of the tenant in tail, then this is a discontinuance in fee; and if after the tenant in tail dieth, his issue may not enter, but is put to his writ of *formedon*. And the cause is, for

that he which hath the grant of such reversion in fee simple, hath the seisin and execution of the same lands or tenements, to have to him and to his heirs in his demesne as of fee, in the life of the tenant in tail. And this is by force of the grant of the said tenant in tail.

§ 621. In the same manner shall it be, if in the case aforesaid the tenant for term of life after the attornment to the grantee had aliened in fee, and the grantee had entered by forfeiture of his estate, and after the tenant in tail had died, this is a discontinuance, *causâ quâ suprâ*.

§ 622. But in this case, if tenant in tail that grants the reversion, &c. dieth, living the tenant for life, and after the tenant for life dieth, and after he to whom the reversion was granted enter, &c. then this is no discontinuance, but that the issue of the tenant in tail may well enter upon the grantee of the reversion; because the reversion which the grantee had, &c. was not executed, &c. in the life of the tenant in tail, &c. And so there is a great diversity when tenant in tail maketh a lease for years, and where he maketh a lease for life; for in the one case he hath a reversion in tail, and in the other case he hath a reversion in fee.

§ 623. For if land be given to a man and to his heirs male of his body engendered, who hath issue two sons, and the eldest son hath issue a daughter and dieth, and the tenant in tail maketh a lease for years and die, now the reversion descendeth to the younger son, for that the reversion was but in the tail, and the youngest son is heir male, &c. But if the tenant had made a lease for life, &c. and after died, now the reversion descendeth to the daughter of the elder brother, for that the reversion is in the fee simple, and the daughter is heir general, &c.

The difference between [these] four (1) cases appeareth plainly, together with the reason thereof; for though it appear before, that regularly a discontinuance is only where livery and seisin is made by a tenant in tail, &c., and notwithstanding the general rule (2) last

(1) The figure 4 is in the MS. it must either be an error of the transcriber, or sect. 621, which is not in the original, must

have been intended to be omitted.—Ed.

(2) Vide 4 H. 7. 17.—Note in MS.

before put in the 118th section, yet in these subsequent cases is specially shewed the different cases when tenant in tail by a grant of reversion with attornment of the tenant in possession in the life-time of the tenant in tail shall be a discontinuance to his issue in tail, and when not; which observe well. For there is a great diversity when tenant in tail doth make a lease for term of years, and when he doth make a lease for term of life; for in the one case he hath a reversion in tail, and in the other case he hath a reversion in fee. For the exterior semblance of discordance in this and other cases, doth rise upon ignorance of the interior intelligence of the said cases, and of the true reason and rule of them; [for] for the most part every particular case is adjudged upon a particular reason. 8 Co. 91 a.

§ 624. Also, if a man be seised in tail of lands devisable by testament, &c. and he deviseth this to another in fee, and dieth, and the other enter, &c. this is no discontinuance, for that no discontinuance was made in the life of the tenant in tail, &c.

This section is plain, and the reason herein alleged; for it is a rule in the law, that the ancestor shall not by any act made by him prejudice his heir, unless the ancestor himself by the same act might also sustain prejudice (1). As a man do make an obligation to John-at-Stile, and thereby bind his heirs to pay ten pounds to him, the heir in this case shall not be charged to pay his debt, though his said ancestor do leave to him assets by descent, *et sic in similibus*. *Vide sect. 734.*

§ 625. Also, if land be given in tail, saving the reversion to the donor, and after the tenant in tail by his deed enfeoff the donor, to have and to hold to him and to his heirs for ever, and deliver to him seisin accordingly, &c. this is no discontinuance, because none can discontinue the estate tail, unless he discontinueth the reversion of him who hath the reversion, &c. or remainder, if any hath the remainder, &c. And in as much as by such feoffment made to the

(1) So Lord Coke says, "No discontinuance can be made by tenant in tail, but such as is made and taketh effect in his life-time, which is here implied in the (&c.);" Co. Lit. 334 b.—Ed.

donor (the reversion then being in him) his reversion was not discontinued nor altered, &c. this feoffment is no discontinuance, &c.

§ 626. In the same manner is it, where lands are given to a man in tail, the remainder to another in fee, and the tenant in tail enfeoff him that is in the remainder, to have and to hold to him and to his heirs; this is no discontinuance, *causâ quâ suprà*.

The reason of these two cases is, because the rule of the law is, that no man can discontinue the estate in tail, except he do discontinue the reversion or remainder also, if any have a reversion or remainder after the estate tail determined. *Fitz. N. B. 142 a, according*. And agreeable to this case is 9 *E. 4. 24 b*; and thereupon it is observed, that by such a feoffment no greater estate doth pass, but for term of the life of tenant in tail; for otherwise the feoffee, one single person, should have two fee simples in our land in himself *simul*. *Plowd. 559 b*. But if tenant in tail be, and the remainder in tail, and the tenant in tail doth enfeoff him in the reversion in fee, this is a discontinuance (1), and the diversity was taken and agreed, when the estate or privity is sole immediate, and when not. 1 *Co. 140 a*. And observe also in *Plowd. 562 a*, another inference and argument made upon this rule of Littleton.

§ 627. Also, if an abbot hath a reversion, or a rent-service, or a rent-charge, and he will grant this reversion, or rent-service, or rent-charge, to another in fee, and the tenant attorn, &c. this is no discontinuance.

§ 628. In the same manner where an abbot is seised of an advowson, or of such things which pass by way of grant without livery of seisin, &c.

These two cases are evident by that which before in this chapter is declared in *sect. 618*.

(1) Lord Coke says, "This must be understood where the reversion of the donor

is immediately expectant upon the estate of the donee." *Co. Lit. 335 a.—Ed.*

§ 629. Also, if tenant in tail letteth his land to another for life, and after he granteth in fee the reversion to another, and the tenant attorn: and after the tenant for life alien in fee, and the grantee of the reversion enter, &c. in the life of the tenant in tail, and after the tenant in tail dieth, his issue shall not enter, but is put to his writ of *formedon*, because the reversion in fee simple which the grantor had by the grant of the tenant in tail, was executed in the life of the same tenant in tail, and therefore it is a discontinuance in fee, &c.

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Read in Littleton, *sect.* 620, and the reason thereof, and in this case is allowed.

§ 630. And note, that some make discontinuances for term of life. As if tenant in tail make a lease for life, saving the reversion to him as long as the reversion is to the tenant in tail, or to his heirs; this is no discontinuance, but during the life of the tenant for life, &c. And if such tenant in tail giveth the lands to another in tail, saving the reversion, then this is a discontinuance during the second tail, &c.

Read this case, and by the words therein it is collected, that if tenant in tail do make a lease generally, without expressing for whose life, it shall be intended for the life of the lessee. *Finch, lib. 1. fo. 15 a.* But if a tenant for life do let for life, this shall be for the life of the lessor, for otherwise it should be a forfeiture of his estate. *Finch, ibidem b. Vide sect. 470.*

§ 631. But where the tenant in tail maketh a lease for years or for life, the remainder to another in fee, and delivereth livery of seisin accordingly, this is a discontinuance in fee, for that the fee simple passeth by force of the livery of seisin, &c.

This case is evident before, because of the livery, and the favor and credit which law doth give it, as is aforesaid. *See sect. 60.*



§ 632. And it is to be understood, that some such discontinuances are made upon condition, &c. and for that the conditions be broken, &c. or for other causes, according to the course of law, such estates are defeated, then are the discontinuances defeated, and shall not by force of them take any man from his entry, &c. As if the husband be seised of certain land in right of his wife, and maketh a feoffment in fee upon condition, and dieth, if the heir after enter upon the feoffee for the condition broken, the entry of the wife was congeable upon the heir, for that by the entry of the heir the discontinuance is defeated, as is adjudged.

See the like cases in Littleton, *sect.* 403, and 8 *H.* 7. *fo.* 7. 4 *H.* 6. 3. and 9 *H.* 7. 24 *b.* *Verberat hic frutices, et capit alter aves*: and in 5 *Co.* the rule is given, *cum aliquid impeditur propter unum, eo remoto tollitur impedimentum*: *fo.* 77: *et frustra fit quod non perseverat*. Littleton doth seem to allow of the opinion in this case, that the wife may enter after the death of her husband, and according is 8 *Co.* 43 *b.* *et eo potius*, because the heir of the husband cannot enter. *Vide sect.* 535. But howsoever the common law was in this case, yet at this day it is clear by the statute 32 *H.* 8. c. 28, that she may enter.

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§ 633. Also, if a woman inheritrix hath a husband who is within age, and he being within age maketh a feoffment of the tenements of his wife in fee, and dieth, it hath been a question if the wife may enter or not, &c. And it seemeth to some, that the entry of the wife after the death of her husband, is congeable in this case. For when her husband made such feoffment, &c. he might well enter, notwithstanding such feoffment, &c. during the coverture; and he could not enter in his own right, but in the right of his wife: *ergo*, such right as he had to enter in the right of his wife, &c. this right of entry remaineth to the wife after his decease.

This case Littleton doth put as a special exception to a rule, that none may take advantage or benefit of the nonage of a feoffor; but the heir, to whom the right and title of the land doth descend. *Vide sect.* 406. And for so much as the infant, who made the feoffment,

might have entered upon the feoffee, and that only in the right of his wife, and not in respect of any right which himself hath, it seemeth reasonable, said Coke, Chief Justice, in 8 Co. 43 *b*, that the wife after her husband's death may enter into her own right, into which lands her husband might have entered in her right, although no privity of blood inheritable is between the husband and wife, but only privity in estate (1). *Vide* 8 Co. 42, 43.

§ 634. And it hath been said, that if two joint-tenants, being within age, make a feoffment in fee, and one of the infants die, and the other surviveth; in as much as both the infants might enter jointly in their lives, this right accrueth all to him which surviveth, and therefore he that surviveth may enter into the whole, &c. And also the heir of the husband which made the feoffment within age cannot enter, &c. because no right descendeth to such heir in the case aforesaid, for that the husband had never any thing but in right of his wife, &c.

Although regularly none shall take benefit of the nonage of his ancestor to avoid his feoffment, but privies in blood to whom the right and title to the land doth descend, as you may read in [8] Co. 43 *a*; yet this is a special case, wherein Littleton saith, *et il ad este dit*, that those that are but privies in estate may have like advantage: and so doth Coke agree, *Ibidem*. For otherwise the mischief would ensue, that the heir of that feoffor who died could not enter, because the right did survive; neither could the survivor enter, because he could not take benefit of the infancy of his companion; but the survivor should be driven to his writ of right; which without question he might have, [because, after the feoffment, the joint-tenants might have] joined (2) in a writ of right.

But if two joint-tenants in fee be within age, and one of them doth make a feoffment in fee of his moiety, and dieth, the survivor cannot enter by occasion of the infancy of his companion; for by his feoffment the joint-tenure was severed, so long as the feoffment doth remain in force; therefore in that case the heir of the feoffor hath the only remedy by writ of *dum fuit infra etatem*, or by entry (3). *Ibidem*.

(1) See Co. Lit. 336 *b*. 337 *a*.—Ed.

(2) See Co. Lit. 337 *a*.—Ed.

(3) See Co. Lit. 337 *b*.—Ed.

§ 635. And also, when an infant make a feoffment being within age, this shall neither grieve nor hurt him, but that he may well enter, &c. for it should be against reason that such feoffment made by him that was not able to make such a feoffment shall grieve or hurt another, to take them from their entry, &c. And for these reasons it seemeth to some, that after the death of such husband so being within age at the time of the feoffment, &c. that his wife may well enter, &c.

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The effect of this section doth appear before, in sect. [633.]

§ 636. Also, if a woman inheritrix taketh husband, and they have issue a son, and the husband dieth, and she takes another husband, and the second husband letteth the land which he hath in right of his wife to another for term of his life, and after the wife dieth, and after the tenant for life surrendereth his estate to the second husband, &c. *quare*, if the son of the wife may enter in this case upon the second husband during the life of the tenant for life, &c. But it is clear law, that after the death of the tenant for life, the son of the wife may enter; because the discontinuance, which was only for term of life, is determined, &c. by the death of the same tenant for life.

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The *quare* made in this case may easily be resolved; for by the surrender made by tenant for term of life, the discontinuance, which was but for his life, was purged and gone; so that the son by the venter may enter, and shall not be compelled to recover his right by action: neither can the second husband have any title to the land, as tenant by the curtesy, contrary to his own feoffment. *Vide* 13 H. 7. fol. [24.]

§ 637. Note, that an estate tail cannot be discontinued, but there where he that makes the discontinuance was once seised by force of the tail, unless it be by reason of a warranty, &c. As if there be grandfather, father, and son, and the grandfather is tenant in tail, and is disseised by the father who is his son, and the father

maketh a feoffment of this without warranty and die, and afterwards the grandfather dies, the son may well enter upon the feoffee, because this was no discontinuance, in as much as the father was not seised by force of the entail at the time of the feoffment, &c. but was seised in fee by the disseisin of the grandfather.

§ 638. Also, if tenant in tail make a lease to another for term of life, and the tenant in tail hath issue and dieth, and the reversion descendeth to his issue, and after the issue granteth the reversion to him descended, to another in fee, and the tenant for life attorn and die, and the grantee of the reversion enter, &c. and is seised in fee in the life of the issue, and after the issue in tail hath issue a son and dieth, it seems that this is no discontinuance to the son, but that the son may enter, &c. for that his father, to whom the reversion of the fee simple descended, had never any thing in the land by force of the entail, &c.

§ 639. For if a man seised in the right of his wife, letteth the same land to another for term of life, now is the reversion of the fee simple to the husband, &c. And if the husband dieth, living his wife and the tenant for life, and the reversion descend to the heir of the husband, if the heir of the husband grant the reversion to another in fee, and the tenant attorn, &c. and afterwards the tenant for life dieth, and the grantee of the reversion in this case enter: in this case this is no discontinuance to the wife, but she may well enter upon the grantee, &c. because the grantor had nothing at the time of the grant, in the right of his wife, when he made the grant of the reversion.

§ 640. And so it seemeth, that men which are inheritable by force of an entail, and never were seised by force of the same entail, that such feoffments or grants by them made without clause of warranty, is no discontinuance to their issues after their decease, but that their issue may well enter, &c. albeit they which made such grants in their lives were forebarred to enter by their own act, &c.

§ 641. And if tenant in tail hath issue two sons, and the eldest disseiseth his father, and thereof maketh a feoffment in fee without clause of warranty, and die without issue, and after the father die,

the youngest son may well enter upon the feoffee; for that the feoffment of his elder brother cannot be a discontinuance, because he was never seised by force of the same tail. For it seemeth to be against reason, that by matter in fact, &c. without clause of warranty, a man should discontinue a deed, &c. that was never seised by force of the same tail.

Note, that an estate cannot be discontinued but there, where he who doth make the discontinuance was once seised by force of the tail, except it be by reason of the warranty. This rule here set down is approved in *Plowd.* 233 *a*, and in 21 *E.* 4. 81 *b*. and are peculiarly exemplified.

§ 642. Note, if there be lord and tenant, and the tenant giveth lands to another in tail, the remainder to another in fee, and after the tenant in tail makes a lease to a man for term of life, &c. saving the reversion, &c. and after granteth the reversion to another in fee, and the tenant for life attorn, &c. and after the grantee of the reversion die without heir, now the same reversion cometh to the lord by way of escheat. If in this case the tenant for life dieth, and the lord by force of his escheat enter in the life of tenant in tail, and after the tenant in tail dieth, it seemeth in this case that this is no discontinuance to the issue in tail, nor to him in the remainder, but that he may well enter, because the lord is in by way of escheat, and not by the tenant in tail. But otherwise it should be if the reversion had been executed in the grantee, in the life of tenant in tail, for then had the grantee been in the tenements by the tenant in tail, &c.

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This case is at large recited in 3 *Co.* 63 *a. et b.* *Nota librum.*

§ 643. Also, if a parson of a church, or vicar of a church, alien certain lands and tenements parcel of his glebe, &c. to another in fee, and die or resign, &c. his successor may well enter, notwithstanding such alienation, as is said in a *nota*, 2 *II.* 4. *Termino Mich.* which beginneth thus.

In the beginning of this section mention is made of a parson of a church, and the vicar of a church; wherefore first, it is to be observed, what a parson and vicar are. Parson peculiarly signifieth the rector of a church, the reason whereof seemeth to be, because he for his time representeth the church, and sustaineth the person thereof, as well in suing as being sued in any action touching the same. See *Fleta*, lib. 6. cap. 18. Parson *impersonée* is he that is possessed of a church, whether appropriated or not appropriated; and so is the new *Book of Entries*, verbo *Aid in Annuity*; and in the Register Judicial *persona impersonata*, for the rector of a benefice presentative and not impropriated: and *Dyer*, fo. 221, numero 19, plainly sheweth that *persona impersonata* is he, that is inducted and in possession of a benefice. *Doctor Cowell's Interpretor*, verbo *Parson*, 27. It is observable that in the common law there are two sorts of vicarages, *vicaria temporalis*, et *vicaria perpetua*, a temporal vicar *non habet titulum sed servit alieno nomine, et propriè curam non habet: secus est de vicaria perpetua, quæ est incompatibilis cum [alio] beneficio, et habet curam animarum, et talis vicarius habet titulum canonicum*; and a *quare impedit* doth lie of such a perpetual vicarage: *Fitz. N. B.* 32. *Register*, 31a: and such a vicar shall have *juris [utrùm]* for lands annexed or given to him by the statute 14 E. 3. cap. 17. *Vide* 40 *Edw.* 3. 28, where *Finchden* said, that though it hath been holden, that a vicar might not have an action for his possessions against any person, yet the law is changed in that point, and by reason when he is endowed to him and his successors perpetually. *Sir John Davies*, fo. 83. And in *Plowd. Com.* 497a, see the original occasion of making a vicar.

Thirdly, the law here is declared, that a parson or a vicar cannot of his glebe make any discontinuance, which also doth agree with the reason in the case before, sect. 413, for every act which he doth, may be avoided by entry of the successor, when he doth cease to be incumbent, viz. by his death, resignation, or otherwise. *Finch's 4th book*, fo. 147 b.

This word "glebe" cometh of an old Latin word *gleba*, lands, and by common use is especially applied to the demesne lands appertaining to the parsonages or vicarages.

The word "resign," here mentioned, is applied and used particularly for the giving up of a benefice; for though it signify all one in nature with (surrender); yet it is by use restrained to the yielding up of a spiritual living. But *resignare* is not among the civil and common lawyers, but *renuntiare*, *reddere*, et *dimittere*, as

it was agreed by six doctors arguing at the Common Place bar. *Dyer*, 294 *a*.

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§ 644. *Nota quod dictum fuit pro lege*, in a writ of account brought by a master of a college against a chaplain, that if a parson, or vicar, grant certain land which is of the right of his church to another and die, or changeth, the successor may enter, &c. And I take the cause to be, for that the parson, or vicar, that is seised, &c. as in right of his church, hath no right of the fee simple in the tenements, but the right of the fee simple abideth in another person; and for this cause his successor may well enter, notwithstanding such alienation, &c.

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The book case is vouched here for the warrant of Littleton's assertion, which is Michaelmas, 2 H. 4. fo. 5, which read unto the permutation. *Vide Register Original*, 307 *a*. It is a writ to an ordinary, commanding him to admit a clerk to a benefice upon exchange made with another: in the case mentioned in 2 H. 4. it is said, that upon a permutation of lands, entry is lawful, without any more. *See* 21 E. 3. fo. 6 et 7. And in Sir John Davies' book, fo. 81 *b*. *vide*, saith he, *Rebuff. in Praxi beneficiorum, titulo de collationibus*, 663, *quot sunt requisita in permutatione beneficiorum, vide in* 2 Co. 74 *b*. The reason and cause wherefore Littleton doth ground his opinion in this and the other section is, because the parson or vicar, who is seised in the right of his church, hath not right of fee simple in his glebe lands and tenements; for it is said, that a parson therein hath but a qualified right. 6 Co. fo. 8 *a*. And in *Fitz. N. B.* 49 *K* a parson hath not the entire fee and right in himself; for the right is in the patron, and also in the ordinary; but a parson, vicar, &c. are sole corporations and bodies politic in the law for the use of the church to many purposes. *Vide* 4 Co. 65 *a*.

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§ 645. For a bishop may have a writ of right of the tenements of the right of his church, for that the right is in his chapter, and the fee simple abideth in him and in his chapter. And a dean may have a writ of right, because the right remains in him. And an abbot may have a writ of right, for that the right remains in him

and in his convent. And a master of an hospital may have a writ of right, because the right remaineth in him and in his confreres, &c. And so of other like cases. But a parson or vicar cannot have a writ of right, &c.

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And according to the diversity taken in this section, touching who may have a writ of right, and who not, is *Fitz. N. B. fo. 6.*

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§ 646. But the highest writ that they can have is the writ of *juris utrùm*, which is a great proof that the right of fee is not in them, nor in any others, &c. But the right of the fee simple is in abeyance, that is to say, that it is only in the remembrance, intendment, and consideration of the law, &c. for it seemeth to me, that such a thing and such a right which is said in divers books to be in abeyance, is as much as to say in Latin, (*scil.*) *Talis res, vel tale rectum, quæ vel quod non est in homine, ad tunc superstite, sed tantummodo est, et consistit in consideratione et intelligentiâ legis, et quod alii dixerunt, talem rem aut tale rectum fore in nubibus.* But I suppose, that they mean by these words (*in nubibus, &c.*) as I have said before.

§ 647. Also, if a parson of a church dieth, now the freehold of the glebe of the parsonage is in none during the time that the parsonage is void, but in abeyance, viz. in consideration and in the understanding of the law, until another be made parson of the same church; and immediately when another is made parson, the freehold in deed is in him as successor.

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So it appeareth, that the highest writ that a parson may have is the writ of *juris utrùm*. *Nota inde Fitz. N. B. fo. 49.* But a writ of right patent lieth only of estate in fee simple, and of no lesser estate. *Fitz. N. B. 1 b.* But a parson, vicar, chauntry priest, or prebendary, cannot have or maintain writs of right patent. *Fitz. N. B. 5.* Upon the premises Littleton doth in this place enforce, that the right of fee simple is not in the parson, nor in any other, but abideth in perpetual abeyance: but as to the frank-tenement in



*fait* Littleton affirmeth, that so soon as a parson is made, the frank-tenement in *fait* is in him, and no longer in suspense or abeyance, but when the church is void of an incumbent; for the law doth give to him fee *jure ecclesiæ*. *Sir John Davies*, 46*a.* and according 12 *H.* 8. *fo.* 7. read the case and matter as in *Fitz. N. B.* 60 *R.* et 10 *H.* 7. 5*b.* and of the word "abeyance" read *Doctor Cowell's Interpreter*, *ibidem*.

*Nota*, that our law, though it doth suffer the fee simple in some cases, *ut hic*, to be in abeyance for some short time; yet it will never suffer the frank-tenement to be in suspense; but doth abhor the suspension of the freehold, as *natura abhorret vacuum*. And for this reason it is, if a lease for years be made, the remainder to the right heirs of John-at-Stiles, this limitation of the remainder is void: and divers other cases you may hereof read in *Sir John Davies' book*, 34*a.*

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§ 648. Also, some peradventure will argue and say, that in as much as a parson, with the assent of the patron and ordinary, may grant a rent-charge out of the glebe of the parsonage in fee, and so charge the glebe of the parsonage perpetually, *ergo* they have a fee simple, or two or one of them have a fee simple at the least. To this may be answered, that it is a principle in law, that of every land there is a fee simple, &c. in some body, or otherwise the fee simple is in abeyance. And there is another principle, that every land of fee simple may be charged with a rent-charge in fee by one way or other. And when such rent is granted by the deed of the parson, and the patron, and ordinary, &c. in fee, none shall have prejudice or loss by force of such grant, but the grantors in their lives and the heirs of the patron, and the successors of the ordinary after their decease. And after such charge, if the parson die, his successor cannot come to the said church to be parson of the same by the law, but by the presentment of the patron and admission and institution of the ordinary. And for this cause the successor ought to hold himself content, and agree to that which his patron and the ordinary have lawfully done before, &c. But this is no proof that the fee simple, &c. is in the patron and the ordinary, or in either of them, &c. But the cause that such grant of rent-charge is good,

is, for that they who have the interest, &c. in the said church, viz. the patron, according to the law temporal, and the ordinary, according to the law spiritual, were assenting or parties to such charge, &c. And this seemeth to be the true cause why such glebe may be charged in perpetuity, &c.

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This is a continuance of the author's former argument *pro et contra*, as you may perceive: and for the several causes here put, it is true that at the common law, if the parson do grant a rent-charge out of his glebe in fee, with the consent and confirmation of the patron and ordinary, it is good, according to the force of the grant, and shall bind the successors of the parson. Also, in 5 Co. fo. 81b. you may see many books cited, that the patron and the ordinary may charge the glebe in the time of vacation, *ergo*, they have interest: and *Fitz. N. B.* 49, saith, that the right is in the patron and ordinary; but how, and in what cases the law is altered, see the stat. 13 Eliz. cap. 20. and 14 Eliz. cap. 11. And it is observable, that such hath been the prudence of the sages of the law, that no sole corporation was at any time trusted with the disposition of his possessions, as to bind his successor; but in such cases he must of necessity have the consent of others, as the bishop of the dean and chapter, the abbot the consent of his convent, the parson the consent of the patron and ordinary, *ut hic, et sic de cæteris*. 10 Co. 60a. For it should not be reasonable to impose so great charge, or to repose such confidence in any sole person, or to give power to one only person to prejudice his successor. 3 Co. 75a. And out of this first case Littleton saith, that some mens opinions are, that the parson, patron, and ordinary, or one of them, have the fee simple in the glebe, and so is the law; for in Sir John Davies' book, fo. 46a, it appeareth, that the law doth give the parson fee simple *in jure ecclesiæ*, though Littleton doth seem to be of another opinion, as may appear by that which followeth, confessing that it is a principle of the common law, that of every land there is a fee simple, and according it is in Sir John Davies' book, fo. 34b.

Also another principle is, that every fee simple land may be charged with rent-charge in fee, by one way or by another: this case also is good law, and affirmed by Popham, Chief Justice, in 1 Co. 147b. thus; when all those, who have interest in the land, do join in the grant of a rent, so that the grant is made *concurrentibus*

*his quæ in jure requiruntur*, the grant is good; and therefore if the patron and ordinary do charge the glebe in the time of vacation, it shall bind, because no other had interest in it during the vacation, but they only (1). *Vide librum*. Also in 10 Co. 49a. upon this maxim of Littleton it was concluded, that if the donor and donee in tail had joined in a grant of a rent-charge, and after the donee had died without issue, and the land had reverted to the donor, that he shall hold it charged; and yet he had but a possibility at the time of the charge made; but all who have estate *in presenti* or *futuro* do join in the charge; *à fortiori* if they had joined in a lease for years, and the donee had died without issue, the lease is good against the donor. *Vide librum*.

It is also in this place positively declared, that none can be parson of a church by the law, but only by presentment of the patron, and admission and institution of the ordinary. It is therefore good to know the distinct office touching this matter. In ancient time these parochial functions were personal, and were not, as now, annexed to foundations and endowments, but rather exercised by messengers sent from the bishops, and they had no such reference to lay patrons, as those that afterwards came in upon presentment have had, but only were protected by special men appointed by the state, as defenders of the church, as they called them, in regard of their assistance and help to such of them as suffered injury, as Justinian's words are. *Vide the History of Tithes* [fo. 81, 82.]

In the canon law, as also in the feuds and in our common law, *patronus* signifies him that hath the gift of a benefit: and the reason is, because the gift of churches and benefices originally belonged unto such good men as either builded them, or else endowed [them] themselves with some great part of the revenues belonging unto them: *Patronum faciunt dos, ædificatio, fundus*, saith the old verse in *Doctor Cowell's Interpretor, verbo Patron*. And in *Plowd. Com. fo. 498b*, it is said, that the land where the church is situated, was holden of the donor, and so shall the advowson be, which is re-

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(1) Lord Coke lays down the principle, on which this point is grounded, very clearly, "herein is a diversity worthy the observation to be made, that when the right of fee simple is perpetually by judgment of law in abeyance, without any expectation to come in *esse*, there he that hath the qualified fee, *concurrentibus*

*his quæ in jure requiruntur*, may charge or alien it, as in the case of parson, vicar, prebend, &c. But where the fee simple is in abeyance, and by possibility may every hour come in *esse*, there the fee simple cannot be charged until it cometh in *esse*." Co. Lit. 343a.—Ed.

posed in the patron in place of the land, on which the church is built. For when devotion grew firm among the people most laymen of fair estate desired the country residence of some chaplains, that might always be ready for christian instruction among them, their families, and adjoining tenants: oratories and churches began to be built by them, and being hallowed by bishops, were endowed with particular maintenance from the founders for the incumbents that should there only reside. But at what time those lay foundations began to be frequent appeareth not most plainly, but some mention is of them about the year of our Lord 700, in *Bede's Hist. Ecclesiæ, lib. 5. cap. 4 & 5*: and about the year 800 many churches founded by laymen are recorded to have been appropriated to the abbey of Crowland, as you see in the charters of confirmation made by Bertulph, King of Mercland, and of others, to the same abbey, reported by Ingulphus, the abbey there. And although in the book of Doomesday, it be specially found, of one Stori, an ancestor [of Walter] of Aincurt, that he might *sine alicujus licentiâ facere ecclesiam* (in Derby and Nottinghamshire) *in suâ terrâ et in suâ socâ*, &c. as if it had been his singular prerogative in his possessions, Graneby, Mortune, Pinnesleg, and other manors; yet that liberty or prerogative of building churches was common, it seemeth, to all lords of manors or large territories until about the time of King John. See the *Hist. of Tithes*, 259, 261, 360: And it is to be observed, that anciently that even till the reign of King Richard 1. or King John, the churches, and the tithes and what else was joined with it, as part of the assigned revenue, passed, in point of interest, from the patron by his gift, (which oftentimes was by livery of a book or a knife upon the altar), not otherwise than freehold conveyed by his deed, and livery; which gave the incumbents real possession of the tithes of the church, and all the revenues, no less than presentation, institution, and induction do at this day; neither was confirmation or assent of the ordinary, as it seemeth, necessary, as of latter times. *The History of the Tithes, chap. 12, fo. 373, et seq. per totum.*

But after such time as the decretals and increasing authority of the canons, about the year 1200, had settled an universal course here of filling the churches by the presentation in the bishops, that use of investiture of churches practised by laymen was left off, neither did the king afterwards, much less common persons, fill their common parochial churches without such presentation from bishops. See in *Dyer*, 294*b.* the form of making a presentation. See in

the *Register Original*, fo. 302 a, concerning the admission and institution. It appeareth by the statute made 9 E. 2. cap. 13. *articuli cleri; de idoneitate personæ præsentatæ ad beneficium ecclesiasticum pertinet examinatio ad judicem ecclesiasticum, et ita est hæcenus usitatum et fiet in futurum.* The admission is the allowance of the ordinary, when he doth admit him, to be able and idoneous, and this is called admission: institution is, when he doth admit him to his charge, the ordinary saith unto the clerk so presented unto him, *instituo te habere curam animarum*, and so the admission is called institution. *Finch's book*, 144 b. And the highest preferment in presentment is, to have authority to examine the ability of the parson that is presented; for if he be able it sufficeth to the discharge of the ordinary, who hath *curam animarum* of all the diocese. *Vide Doct. et Stud.* 126 b.

It is also in this section to be observed, that the author's opinion appeareth to be, that admission and institution is sufficient and effectual to make a parson of a church without induction, and so verily is the law you may see in 4 Co. 79 a. By institution *ecclesia plena et consultata existit* against all persons except against the king. For every rectory doth consist upon spiritualities and temporalities, and as to the spirituality, that is to say, *curam animarum*, he is complete parson by the institution; for when the bishop upon examination doth find him able, then he doth institute him, and saith, *instituo te ad talem beneficium et habere curam animarum* of such a parish, *et accipe curam tuam et meam.* *Vide* 33 H. 6. 13. But unto the temporalities, as the glebe lands, &c. the parson hath no freehold in them, until induction. *Plowd.* 528 a. And this is the reason wherefore, if the issue be, full or not full, it shall be tried by the bishop, because the church is full by the institution, which is a spiritual act; for if it should not be full till induction, then full or not full should be tried by the jury, at the common law. See 6 Co. 29 a.

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§ 649. Also, if tenant in tail hath issue and is disseised, and after he releaseth by his deed all his right to the disseisor: in this case no right of tail can be in the tenant in tail, because he hath released all his right. And no right can be in the issue in tail during the life of his father. And such right of the inheritance in tail is not altogether expired by force of such release, &c. *Ergo*, it must needs be that such right remain in abeyance, *ut supra*,

during the life of tenant in tail that releaseth, &c. and after his decease such right presently is in his issue in deed, &c.

§ 650. In the same manner it is, where tenant in tail grant all his estate to another; in this case the grantee hath no estate but for term of life of the tenant in tail, and the reversion of the tail is not in the tenant in tail, because he hath granted all his estate and his right, &c. And if the tenant to whom the grant was made make waste, the tenant in tail shall not have a writ of waste, for that no reversion is in him. But the reversion and inheritance of the tail, during the life of the tenant in tail, is in **abeyance**, that is to say, only in the remembrance, consideration, and intelligence of the law.

And for the understanding of these two sections, read in *Plowd. fo. 556 a*, and in *3 Co. 84 b*. And in *Plowd. fo. 554 b*, Serjeant Manwood saith, that by the feoffment of the tenant in tail his estate tail doth not pass, and nevertheless it doth not remain in the tenant in tail, and therefore the estate tail must be in suspense, and in abeyance: and this case of Littleton is by him alleged, to prove his opinion to be, that an estate once made may be in abeyance. But this opinion when tenant in tail doth grant *totum statum suum*, that a greater estate doth pass from the tenant in tail than for the life of the tenant in tail, and that the reversion and inheritance of the entail should remain in abeyance during the life of the tenant in tail is denied to be law by Plowden and by Serjeant Barkham (1): which see in *Plowd. 556 a. Vide librum*. And so adjudged *ibidem, fo. 560 b*, and *564 a, b. Et ibidem in Plowd. 556*, one special reason alleged, whereby things shall be in abeyance: and *ibidem, 562 b, et seq.* another special case and reason; but these cases of Littleton do not agree with either of them, and therefore also are alleged many inconveniences would ensue, if the law in that case of abeyance should be as Littleton saith.

(1) Lord Coke says, on the contrary, "Here he putteth two cases where a right of an estate tail may be in abeyance by the act of the party, which are so clear and evident, as there needs no further

proof or argument than Littleton hath justly and artificially made, albeit some objections of no weight have been made against it." *Co. Lit. 345 a.*—Ed.

§ 651. Also, if a bishop alien lands which are parcel of his bishopric and die, this is a discontinuance to his successor, because he cannot enter, but is put to his writ of *de ingressu sine assensu capituli*.

§ 652. Also, if a dean alien lands which he hath in right of him and his chapter, and dieth, his successor may enter. But if the dean be sole seised as in right of his deanery, then his alienation is a discontinuance to his successor, as is said before.

The reason of the common law in this case was, because the bishop was seised of his bishopric, and all his temporalities, in fee simple, and he had no superior over him, and therefore by his feoffment and livery, a discontinuance may be wrought, so that his successor cannot enter. But the common law did never give to the bishop power utterly to prejudice his successor, or to bar them of their rights, as before appeareth. Also, if a dean be sole seised, as in right of his deanery, his alienation is a discontinuance; but if a dean do alien the lands which he hath in right of him and his chapter, and dieth, this is no discontinuance, because he hath not the fee simple solely. *Finch's book, fo. 50 a. 21 E. 4. 76.*

But now by the statute made 1 Eliz. bishops are restrained to make alienation, or any estates otherwise than by the statute is permitted. See 11 Co. 71 b. And *nota*, 3 Co. fo. 75 b, it is proved, that at the first all the possessions were of the bishops, and afterwards certain portions were assigned to the dean and chapter: and in the 10 Co. 28 b, so that the bishop hath part in himself, and the chapter the residue, and their possessions for the most part are divided, the dean having some part sole in the right of his deanery, and the particular prebendaries have part in the right of their prebends, the residue the dean and chapter have together, and every of them is to this purpose incorporate to himself: all which you may read in *Finch's book, 138 b.*

§ 653. Also, peradventure some will argue and say, that if an abbot and his convent be seised in their demesne as of fee of certain lands to them and to their successors, &c. and the abbot

without the assent of his convent alien the same lands to another and die, this is a discontinuance to his successor, &c.

§ 654. By the same reason they will say, that where a dean and chapter are seised of certain lands to them and their successors, if the dean alien the same lands, &c. this shall be a discontinuance to his successor, so as his successor cannot enter, &c. To this it may be answered, that there is a great diversity between these two cases.

§ 655. For when an abbot and the convent are seised, yet if they be disseised, the abbot shall have an assise in his own name, without naming the convent, &c. And if any will sue a *præcipe quòd reddat*, &c. of the same lands when they were in the hands of the abbot and convent, it behoveth that such action real be sued against the abbot only, without naming the convent, because they are all dead persons in law, but the abbot who is the sovereign, &c. And this is by reason of the sovereignty; for otherwise he should be but as one of the other monks of the convent.

§ 656. But dean and chapter are not dead persons in law, &c. for every of them may have an action by himself in divers cases. And of such lands or tenements as the dean and chapter have in common, &c. if they be disseised, the dean and chapter shall have an assise, and not the dean alone, &c. And if another will have an action real for such lands or tenements against the dean, &c. he must sue against the dean and chapter, and not against the dean alone, &c. and so there appeareth a great diversity between the two cases, &c.

§ 657. Also, if the master of an hospital discontinue certain land of his hospital, his successor cannot enter, but is put to his writ of *de ingressu sine assensu confratrum et consororum*, &c. And all such writs fully appear in the Register, &c.

These sections do at large declare and prove the diversity between the causes, when an abbot and his convent are seised in fee, and when a dean and his chapter are seised in fee. The feoffment of the abbot alone doth make a discontinuance, but not in the other



case of the dean and chapter. The reasons of this diversity are fully and plainly delivered by Littleton; and the case of a master of an hospital, and the reason thereof, is all one with that of a bishop.

§ 658. Also, if land be let to a man for term of his life, the remainder to another in tail, saving the reversion to the lessor, and after he in the remainder disseiseth the tenant for term of life, and maketh a feoffment to another in fee, and after dieth without issue, and the tenant for life dieth; it seemeth in this case, that he in the reversion may well enter upon the feoffee, because he in the remainder which made the feoffment was never seised in tail by force of the same remainder, &c.

The reasons of this case and the other, 641, 640, 638, are one, *scilicet*, because he in the remainder, who made the feoffment, was never seised in the tail by yirtue of his remainder; but his seisure of the possession of the land was by a disseisin by him done to the tenant for life. Also it appeareth that he in the remainder died without issue living tenant for life, and therefore he in the reversion may enter.

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If (1) thou art desirous to know the reason, wherefore such divers constructions have been made upon the words of the statute of Westm. 5. cap. 1. *de donis conditionalibus, videlicet, non habeant illi quibus tenementum sic fuerit datum sub conditione, potestatem alienandi tenementum sic datum quo minus ad exitum illorum, quibus tenementum sic fuerit datum, remaneat post illorum obitum, vel ad donatorem, &c. revertatur.*

As if tenant in tail do make a feoffment in fee, this is a discontinuance, and voidable by action only.

If tenant in tail of a rent, or of other thing, which doth lie in grant, do grant it in fee, this is no discontinuance, but it is voidable by claim or by action.

(1) The following pages, to the end of this Chapter, are copied *verbatim* from 3 Co. 85 b.—*Ed.*

If tenant in tail of land do grant a rent out of it, the rent is absolutely determined by his death.

If tenant in tail be disseised, and release unto his disseisor, this is no discontinuance, and the estate is voidable by the entry or action of the issue of the tenant in tail.

But if the release be with warranty, this is a discontinuance, so that the issue in tail be heir to the warranty.

But if tenant in tail do make lease for term of his own life, or for years, and do release unto his lessee, and his heirs, this is no discontinuance, though his release be with warranty. So if tenant in tail do make a lease for life, and after do grant the reversion in fee, this is no discontinuance of the fee, except it be executed in the life of the grantor.

And all these (and many other) divers constructions have been made upon the same words before said, *videlicet, non habeant illi quibus tenementum sic fuerit datum sub conditione potestatem alienandi, &c.* this is the reason which is worthy of observation; for the judges have construed the said words of the said statute according to the rule and reason of the common law, which is always *optimus interpretandi modus*.

For at the common law, if a bishop or an abbot, &c. or man seised in the right of his wife, do make a feoffment in fee, this is by the common law a discontinuance, and doth put the successor or his wife, to their actions, for the favor which the law doth give to estates, which do pass by livery and seisin; because it is public and notorious, and in ancient time that was the common and usual assurance of the land.

But if a bishop, or man in the right of his wife, seised of a rent, or of any thing which doth lie in grant, do by deed grant it in fee, this is no discontinuance, and yet the estate is not absolutely determined by the death of the bishop, &c. or of the husband; for the successor or his wife have election to determine it, and to make it void, either by bringing their writ to make it voidable, or by claim upon the land to make it void.

But if a bishop, &c. or a man, grant a rent in fee out of the land of his wife, or of the bishopric, that is absolutely void by the death of the bishop, &c. or of the husband.

Also, if the bishop or the husband and wife be disseised, [and] after the bishop, or the husband, do release unto the disseisor, this is no discontinuance.

If the bishop, or husband, do make a lease for years, and do release unto the lessee, and his heirs, this is not absolutely determined by the death of the bishop, or of the husband; but is void or voidable at the election of the successor, or of the wife.

But if the bishop, or the husband, make a lease for life, and after grant the reversion in fee, and lessee for life dieth in the life of the bishop, or of the husband, this is a discontinuance: otherwise it is if the lessee survive the bishop, or husband: *vir bonus est quis? qui consulta patrum, qui leges juraque servat.* 3 Co. 86.

### LIB. III. CAP. XII.—REMITTER.

§ 659. Remitter is an ancient term in the law, and is where a man hath two titles to lands or tenements, viz. one a more ancient title, and another a more latter title; and if he come to the land by a latter title, yet the law will adjudge him in by force of the elder title, because the elder title is the more sure and more worthy title. And then when a man is adjudged in by force of his elder title, this is said a remitter in him, for that the law doth admit him to be in the land by the elder and surer title: as if tenant in tail discontinue the tail, and after he disseiseth his discontinuee, and so dieth seised, whereby the tenements descend to his issue or cousin inheritable by force of the tail, in this case, this is to him to whom the tenements descend, who hath right by force of the tail a remitter to the tail, because the law shall put and adjudge him to be in by force of the tail, which is his elder title: for if he should be in by force of the descent, then the discontinuee might have a writ of entry *sur disseisin* in the *per* against him, and should recover the tenements and his damages, &c. But in as much as he is in his remitter by force of the tail, the title and interest of the discontinuee is quite taken away and defeated, &c.

Remitter is an ancient term in the law, and is as much as *restituere* or *responere* in Latin, and is a when a man hath two titles unto lands or tenements, that is to say, one more ancient title, and

the other title more latter; if he do come to the land by the latter title, yet the law shall adjudge him in by force of the more ancient title; because the old title is the more surer title, and the more worthy title. And then when a man is adjudged in by force of his oldest title, this is unto him said a remitter, because the law doth place him to be in by the oldest and surest title.

And upon this reason, that the eldest is the most worthy, see sect. 5, in the case of three brothers; if the middle brother purchaseth lands in fee simple, and dieth without issue, the eldest brother shall have the land by descent, and not the younger, because the eldest is most worthy of blood. *See in Sir John Davies' book, fo. 30 a.* Also, see sect. 464, to prove another case Littleton useth this argument, this is by the common law of the land, *ergo*, this [is] for a great cause: and the cause is, for that the law will, &c. and see 10 Co. 67, put for a rule, *fortior et potentior est dispositio legis quam hominis: et* [8 Co.] 152 a. *ibidem*.

Littleton doth proceed explaining this general position by particular cases, thus; if tenant in tail do discontinue the tail, and after he doth disseise the discontinuee, and so dieth seised, whereby the tenements descend to his issue or cousin, inheritable by force of the tail; in this case, this is a remitter to the estate tail unto him to whom the tenements do descend, who hath right by force of the tail; because the law doth put and adjudge him to be in by force of the tail, which is his eldest title: for if he should be in by force of the descent, then the discontinuee (who was thereof disseised) might have a writ of entry upon disseisin in the *per* against him, and recover the tenements, damages, &c. But for so much as he is in by force of the tail, the title and the interest, which the discontinuee had, is utterly annulled and defeated. And if you desire to know the cause of the writ of entry in *de quibus* at the common law, read in *Fitz. N. B.* 191 D, and in *Finch's book*, 91 b.

And in 8 Co. fo. 50 a, it is said, at the common law assise was *remedium*, not only *maximè festinum*, but also *maximè beneficiale*; for in no action at the common law a man could recover the land itself and damages, but only in assise against the disseisor, and not against any other: therefore by the statute of Gloucester, cap. 1. (which see in sect. 685) it is specially provided, that the disseisee shall recover damages in a writ of entry founded upon disseisin. *Vide sect. 633.* Of the premises thus you may read in *Finch's book*, fo. 50 b; if he, whose entry is taken away by a descent or by discontinuance, have the frank-tenement cast upon him by a new title,

he shall be in of his more elder title, the which is termed a remitter; first, as if the heir of disseisor, who is in by descent, do make a lease to John-at-Stile, the remainder for life or in fee to the disseisee; 2dly. if tenant in tail do discontinue, and after he doth disseise the discontinuee, and dieth seised, by which the tenement descend to his issue; 3dly. if the husband do make a feoffment in fee, whereof he is seised in the right of his wife; in this case the disseisee after the death of J. at S., the issue in tail, and the wife, if she survive her husband, are remitted; and in case of the tenant in tail before, although the heir of the discontinuee was within age at the time of the descent unto the issue in tail, yet his entry is quite taken away, because the issue in tail is remitted.

§ 660. Also, if tenant in tail enfeoff his son in fee, or his cousin inheritable by force of the tail, which son or cousin at the time of the feoffment is within age, and after the tenant in tail dieth, and he to whom the feoffment was made is his heir by force of the tail; this is a remitter to the heir in tail to whom the feoffment was made. For albeit that during the life of the tenant in tail who made the feoffment, such heir shall be adjudged in by force of the feoffment, yet after the death of tenant in tail, the heir shall be adjudged in by force of the tail, and not by force of the feoffment. For although such heir were of full age at the time of the death of the tenant in tail who made the feoffment, this makes no matter, if the heir were within age at the time of the feoffment made unto him. And if such heir being within age at the time of such feoffment, cometh to full age, living the tenant in tail that made the feoffment, and so being of full age he charges by his deed the same land with a common of pasture, or with a rent-charge, and after the tenant in tail dieth; now it seemeth that the land is discharged of the common, and of the rent, for that the heir is in of another estate in the land than he was at the time of the charge made, in as much as he is in his remitter by force of the tail, and so the estate which he had at the time of the charge is utterly defeated, &c.

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If tenant in tail do enfeof his son in fee or his cousin inheritable by force of the entail, the which son or cousin at the time of the feoffment is within age, and after the tenant in tail dieth, and he to whom the feoffment was made is his heir by force of the entail: this is a remitter to the heir in tail to whom the feoffment was made. For although that during the life of the tenant in tail, who made the feoffment, such an heir shall be judged in by force of the feoffment, yet after the death of the tenant, the heir shall be adjudged in by force of the tail, and not by force of the feoffment. For although such an heir were at full age at the time of the death of the tenant in tail who made the feoffment, this doth not make any matter, if the heir be within age at the time of the feoffment made unto him. 40 E. 3. 44, *accordat*. And see in *Finch's book*, fo. 4a, divers cases upon this ground, viz. things shall be construed according to the original cause thereof, and according to the commencement thereof. And in 2 Co. 93a, it is said, when divers accidents are requisite to the confirmation of a thing, the law in divers cases doth more respect the original cause than any other: *causa et origo est materia negotii*, as it is in 1 Co. 99b, *quod ab initio non valet tractu temporis non conualescet*. 4 Co. fo. 2. et 2 Co. fo. 55. 8 Co. fo. 135. *Sir John Davies*, fo. 32a.

Littleton's case doth proceed, and if such an heir being within age at the time of such feoffment made unto him, do come to full age, living the tenant in tail who made the feoffment, and so being of full age living the tenant in tail he doth charge by his deed the same land with a common of pasture, or with a rent-charge, and after the tenant in tail dieth; now it seemeth that the land is discharged of the common, and of the rent; because the heir is in of another estate of the land than he was at the time of the charge made by him; because he is in the remitter by force of the tail, and so the estate that he had at the time of the charge is utterly defeated; and that by the operation of the law. But observe in this case, if the heir being of full age, do charge the land after the death of his father tenant in tail, so that the remitter was executed, the heir cannot avoid his own grant.

And see sect. 286 and sect. 289, the diversity between the case of a rent-charge and a lease for years, made of the land by one joint-tenant of his part: and so according to that diversity it is said in *Dyer*, 51b, touching our present section, viz. that in Littleton's case of a feoffment made of a tenant in tail to his eldest son within age, and when he cometh to full age he doth make a lease for years,

and after the father dieth, so that the son is remitted; yet he shall not avoid his lease as he should do a grant (1); *by Bromley, nota diversitatem*, 7 Co. 9 a. In 21 H. 6. 41 a, if a disseisor grant a rent-charge, and afterwards the disseisee do release to the disseisor, yet the grant of the rent-charge is in force; but if the disseisee had entered upon the disseisor, otherwise it had been; for during the possession upon which the rent is granted, in his force not defeated, the rent cannot be defeated or discharged by the acceptance of a release from the disseisee: 14 H. 8. 5 a, *accordat: and see sect. 477, according:* and the cause is, as Littleton in that place saith, because a man shall not have advantage by such a release which should be against his proper acceptance, and his own grant. And therefore if tenant for life be, the remainder in tail, the remainder to the right heirs of tenant for life, and the tenant for life doth grant a rent-charge, and dieth, and the tenant in tail dieth, he who is heir to the tenant for term of life, shall hold it charged; which case see in 5 E. 4. 2 b. And I did hear Serjeant Chickworth put this case: if I make a lease for term of five years, upon condition that if the lessee do pay to me 10*l.* within this term, that he shall have fee, and I do make to him livery according; in this case, although the fee is not out of the lessor, till the lessee have performed the condition, and then it is in the lessee, and not before; because the condition is subsequent; for if the lessee commit waste before the condition performed, the lessor shall have an action of waste against him; yet if the lessee, before he had performed the condition, and during the five years, had granted a rent-charge, and afterwards had performed the condition, he shall not avoid that charge, but shall hold his land charged.

Tenant in tail doth make a lease for life now he hath gained a new fee simple by wrong, and after he doth grant a rent-charge, or do make a lease for years, and after the tenant for life dieth, he shall not avoid the charge or lease, although he be in of another estate; for he had a defeasible estate in possession, but his right was ancient; like the case in 11 H. 7. 21, Edrich, tenant in tail, did make a feoffment to his use upon condition, and after upon his recognizance the land is extended by the statute made 1 R. 3. cap. 1. and after he doth perform the condition, yet the interest of the cognizee shall not be avoided, though the estate be charged; and this

(1) See Co. Lit. 319 a.—Ed.

was affirmed *per curiam*, in 7 Co. 14 a, in *Englefield's case*, a good case in *Dyer*, 141 a.

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§ 661. Also, a principal cause why such heir in the cases aforesaid, and other like cases, shall be said in his remitter, is, for that there is not any person against whom he may sue his writ of *formedon*: for against himself he cannot sue, and he cannot sue against any other, for none other is tenant of the freehold; and for this cause the law doth adjudge him in his remitter, *scil.* in such plight as if he had lawfully recovered the same land against another, &c.

*Vide Plowden, fo. 543 b, and Finch, fo. 6 a*, doth set it down for a rule, that a man cannot present himself a benefice, nor make himself an officer: 3 H. 8. 22: nor sue himself. And a man who hath right to land, and the freehold is after laid upon him by a latter title, he shall be remitted, that is to say, he shall be said in by his elder title; because there is not any against whom he may have an action to recover the land, and he cannot sue himself. *See sect. 57.* Also *nota* that which is in 3 Co. fo. 3 a, that neither action without right, neither right without action, &c. shall make a remitter (1); the first is apparent, and resolved by the court in the principal case there: and as to the second it was said, that a man shall never be remitted, but where, if the right and possession were in several persons, he that hath right might have an action to recover the possession. Therefore 5 H. 7. fo. 38 a, is, that a man shall not be remitted to an advowson appendant, although he have right to it, before he hath recontinued the manor to which, &c. because before that he had recovered the manor, he had no action to recover the advowson. So if a man purchase an advowson in fee, and do suffer an usurpation, and six months do pass, now he hath right, but for so much as he hath no remedy for it, he never shall be remitted to it, although the advowson be cast upon him, either by descent, or by any other act in law, *et sic de similibus*. For want of right and want of remedy are in one equipage; for a man shall not be remitted to a right remediless, which see 6 Co. 58 b. And observe in

(1) See Co. Lit. 319 b, — Ed.



*Plowden, ubi supra*, other cases put to the effect of this section, that a *præcipe quod reddat* lieth only against a tenant of the freehold, and not against lessee for years, or any other, who hath but a chattel real; neither can the freehold be recovered against him, that hath not a freehold; a special case of a writ of dower against guardian in chivalry only excepted: and see sect. 57 (1).

In this section is touched which is also resolved in 8 Co. 95 b, that a præcept [lies only against the tenant of the freehold.]

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§ 662. Also, if land be entailed to a man and to his wife, and to the heirs of their two bodies begotten, who have issue a daughter, and the wife dieth, and the husband taketh another wife, and hath issue another daughter, and discontinue the tail, and after he disseiseth the discontinuee and so die seised, now the land shall descend to the two daughters. And in this case as to the eldest daughter who is inheritable by force of the tail, this is no remitter but of the moiety. And as to the other moiety, she is put to sue her action of *formedon* against her sister. For in this case the two sisters are not tenants in parcenary, but they are tenants in common, for that they are in by divers titles. For the one sister is in her remitter by force of the entail, as to that which to her belongeth; and the other sister is in as to that which to her belongeth in fee simple by the descent of her father, &c.

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See 43 E. 3. 26 b, *accordant*: and *nota* the saying of Anthony Browne, Justice, in *Plowd. fo. 246*, although the right of the land do descend, yet if the possession do not descend to him also, he shall not be remitted; and this is the reason in the case in 19 H. 6. where a wife tenant in general tail hath issue a daughter, and by the second husband hath issue another daughter, and she and her second husband do discontinue in fee, and do take back again estate to them and to the heirs of their two bodies, and die, and

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(1) In the MS. the sect. 661 is noted after this passage: but the foregoing remarks are evidently intended to apply to

it: and the succeeding paragraph would seem to be a needless repetition.—*Ed.*

so the land doth descend to the youngest daughter, it is adjudged, that the eldest daughter is not remitted to any part; for though the right do descend, yet she hath no possession descended, and therefore she shall not be remitted.

§ 663. In the same manner it is if tenant in tail enfeoff his heir apparent in tail (the heir being within age) and another joint-tenant in fee, and the tenant in tail dieth; now the heir in tail is in his remitter as to the one moiety, and as to the other moiety he is put to his writ of *formedon*, &c.

And observe in this section a special case, where lands did descend to two sisters, and nevertheless they are not parceners, but tenants in common, because they are in by several titles. And the reason wherefore the heir shall not be remitted to all, but only to the moiety is, because the possession of more than the moiety doth not descend to him, and the other joint-tenant is in by a legal conveyance; but if the heir apparent and a stranger do disseise the father, being tenant in tail or in fee, the father dieth, his son within age, or of full age, the son is remitted unto all; for the descent is as a release in law, and as strong as a release in *fact*; as in the case, if two disseisors be, and the disseisee do release to one of them, he shall hold his companion out. 11 II. 7. 12 a, and see sect. 306, 307, and see 21 E. 4. 78 b.

§ 664. Also, if tenant in tail enfeoff his heir apparent, the heir being of full age at the time of the feoffment, and after tenant in tail dieth, this is no remitter to the heir, because it was his folly that being of full age he would take such feoffment, &c. But such folly cannot be adjudged in the heir being within age at the time of the feoffment, &c.

The consequence of this case, where the heir apparent in tail is of full age at the time of his acceptance of the feoffment [is], such an heir shall be subject to all incumbrances made to charge the land, because it was his folly, that he being of full age, would take such

a feoffment, as that case is. But in case where the entry of a man is congeable, in such cases, although he do take estate to him, when he is of full age, for term of life or in tail, or in fee, this is a remitter to him. *Sect. 693.*

§ 665. Also, if tenant in tail enfeoff a woman in fee and dieth, and his issue within age taketh the same woman to wife; this is a remitter to the infant within age, and the wife then hath nothing, for that the husband and his wife are but as one person in law. And in this case the husband cannot sue a writ of *formedon*, unless he will sue against himself, which should be inconvenient; and for this cause the law adjudgeth the heir in his remitter, for that no folly can be adjudged in him being within age at the time of the espousals, &c. And if the heir be in his remitter by force of the intail, it followeth by reason that the wife hath nothing, &c. For in as much as the husband and wife be as one person, the land cannot be parted by moieties; and for this cause the husband is in his remitter of the whole. But otherwise it is if such heir were of full age at the time of espousals, for then the heir hath nothing but in right of his wife, &c.

Concerning that which in this case is said, that a man and his wife are but one person in the law (1), see *sect. 291*; and *nota* therefore the land cannot be severed by moieties; and for this cause the husband is in the remitter of the whole. *Vide 3 Co. 5 a.* But put the case, that tenant in tail do enfeoff a man in fee, and dieth, and his issue inheritable within age, being a daughter, doth take the same to her husband, this is not a remitter unto the female heir, neither doth discontinue her husband's estate and interest which her father conveyed unto him, such subsequent marriage with the heir in tail notwithstanding. *Causa patet.* Littleton saith, in the end of this section, but otherwise it is if such an heir were of full age at the time of the espousals; for the husband hath nothing but only in right of his wife, of which see in *Plowd. 89 a.*

(1) Tenant in tail enfeoffs his son, and his wife within age, the son is remitted to the whole. See 668. p. 22.—*Note in MS.*

§ 666. Also, if a woman seised of certain land in fee taketh husband, who alieneth the same land to another in fee, the alienee letteth the same land to the husband and wife for term of their two lives, saving the reversion to the lessor and to his heirs; in this case the wife is in her remitter, and she is seised in deed in her demesne as of fee, as she was before, because the taking back of the estate shall be adjudged in law the fact of the husband, and not the fact of the wife; so no folly can be adjudged in the wife, which is covert in such case: And in this case the lessor hath nothing in the reversion, for that the wife is seised in fee, &c.

See 8 II. 7. 8 *a*, according, and by this the precedent section may appear, that infancy doth excuse folly; but infancy will not excuse wrong. 18 II. 8. 5. 19 II. 8. 13. And note, that although it be in this case said, that the wife by the remitter is seised in *fact* in her demesne of fee, yet as this case is, if the husband have issue after by her, yet the husband shall not be thereof seised in right of his wife, so that he shall be tenant by the curtesy thereof, after the death of his wife. 9 II. 7. 2 *b*. And see in *Plowd.* 114 *b*, that the wife is not to all intents remitted, unless she do survive her husband.

§ 667. But in this case if the lessor will sue an action of waste against the husband and his wife, for that the husband hath committed waste, the husband cannot bar the lessor by shewing this, that the taking back of the estate to him and to his wife was a remitter to his wife, because the husband is stopped to say that which is against his own feoffment, and taking back of the estate for term of life to him and to his wife: And yet the lessor hath no reversion, for that the fee simple is in the wife. And so a man may see one thing in this case, that a man shall be stopped by matter in fact, though there be no writing by deed indented or otherwise.

And see Finch's book, 2*d* part, fo. 33 *a*, according, in these words; sometimes bare acts without indentures, or such [matter] do make an estoppel, as if the husband discontinue the lands of the wife,

and take again estate unto him and his wife for their lives, the wife is remitted, but the husband, by this bare taking back (1), is estopped to say so. *Vide sect. 672.* For the nature of all estoppels is, to stop or stay a man from saying the very truth; therefore regularly, estoppels are by matters of record or by indentures. *Vide inde sect. 693.* But this is a special case of estoppels by matter in *fait* only.

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§ 668. But if in the action of waste the husband make default to the grand distress, and the wife pray to be received, and is received, she may well shew the whole matter, and how she is in her remitter, and she shall bar the lessor of his action, &c.

See the statute of Westminster 2. cap. 3; which statute doth give the receipt in these words, *Si uxor ante judicium venerat parata petenti respondere, et jus suum defendere, admittatur*; and see more in *Plowd.* 13 *b*; and see the case where the wife was received in default of her husband in an action of waste, brought against them according to this case, and 9 *E. 4. fo. 16, abridged also by Brooke, Resceit, 122.*

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§ 669. For in every case where the wife is received for default of her husband, she shall plead and have the same advantage in pleading, as she were a woman sole, &c. And albeit that the alienee made the lease to the husband and wife by deed indented, yet this is a remitter to the wife. And also albeit the alienee rendereth the same land to the husband and his wife by fine for term of their lives, yet this is a remitter to the wife, because a *fême covert* which takes an estate by fine, shall not be examined by the justices, &c.

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And note in 10 *Co. 42 b, and 43 a*, that no wife or covert shall be barred by her confession concerning her inheritance or freehold, but when she is examined by due course of law. 15 *E. 4. 8. 44 E. 3. 28. Vide 14 E. 4. 5.* And none have power to examine

(1) In the MS. it appears to be written "by this bare taking back," which are thus, "by the remainder," instead of the words in Finch.—*Ed.*

a *fême covert* without a writ. *Vide* 21 E. 3. 43, *John de Holborn's case*. And this is the cause, that if husband and wife do acknowledge a statute or recognizance, it is void as unto the wife, although she do survive her husband, as it was holden, *Pasche*, 17 *Eliz. in the Countess of Lennox's case*. And see more of this matter in 10 *Co. ibidem*, and in *Keilw.* 8 *b*, *et fo.* 10 *b*.

§ 670. And here note, that when any thing shall pass from the wife which is covert of a husband, by force of a fine, as if the husband and wife make conusance of right to another, &c. or make a grant and render to another, or release by fine unto another, *et sic de similibus*, where the right of the wife shall pass from the wife by force of the same fine; in all such cases the wife shall be examined before the fine be taken, because that such fines shall conclude such *fêmes coverts* for ever. But where nothing is moved in the fine but only that the husband and wife do take an estate by force of the said fine, this shall not conclude the wife, for that in such case she shall not be at all examined, &c.

And *nota*, in the end of this section, where nothing is moved in a fine, but only that the husband and his wife do take estate by force of the same fine, this shall not conclude the wife; because that she in such cases never shall be examined. But, as it is in the first part of this section, when any thing doth pass from the wife covert, by force of any fine, she must be examined. And *nota*, hereupon it is resolved in 2 *Co.* 58. thus, verily if the law do require such ceremony of secret examination of women covert before a judge, touching her free and voluntary assent, as if she were a *fême sole*, that should be against reason, that the husband against the assent of his wife may dispose of the use of the lands of his wife, which is all the fruit of the land now. Read the case. *Vide Finch*, 50 *b*.

§ 671. Also, if tenant in tail discontinue the tail, and hath issue a daughter, and dieth, and the daughter being of full age taketh husband, and the discontinuee make a release of this to the husband and wife for term of their lives, this is a remitter to the wife, and the wife is in by force of the tail, *causâ quâ suprà*, &c.

§ 672. Also, if land be given to the husband and to his wife, to have and to hold to them and to the heirs of their two bodies begotten, and after the husband alien the land in fee, and take back an estate to him and to his wife for term of their two lives; in this case this is a remitter in deed to the husband and to his wife, mauger the husband. For it cannot be a remitter in this case to the wife, unless it be a remitter to the husband, because the husband and wife are all one same person in law, though the husband be stopped to claim it. And therefore this is a remitter against his own alienation and reprisal, as is said before.

*Vide antea, sect. 667, and the diversity.* For the feoffment and reprisal of a new estate was an estoppel to the husband; but it is not so in this case, in respect of the wife, though indeed his mouth is stopt from so saying.

§ 673. Also, if land be given to a woman in tail, the remainder to another in tail, the remainder to the third in tail, the remainder to the fourth in fee, and the woman taketh husband, and the husband discontinue the land in fee; by this discontinuance all the remainders are discontinued. For if the wife die without issue, they in the remainder shall not have any remedy but to sue their writs of *formedon* in the remainder, when it comes to their times. But if after such discontinuance, an estate be made to the husband and wife for term of their two lives, or for term of another man's life, or other estate, &c. for that this is a remitter to the wife, this is also a remitter to all them in the remainder. For after that, that the wife which is in her remitter be dead without issue, they in the remainder, may enter, &c. without any action suing, &c. In the same manner is it of those which have the reversion after such entails.

See 14 *Eliz.* 7 *a, b*, accordant, and see in 5 *Co.* 76 *b*, et 77 *a*, these two rules, *Remoto impedimento emergit actio*. 2. *Cum ali-quid impeditur propter unum eo remoto tollitur impedimentum*.

And the premises in this section is a proof, that the land and the reversion are not two distinct things, but that in the reversion the land is contained. *Plowd.* 157 *a*.

§ 674. Also, if a man let a house to a woman for term of her life, saving the reversion to the lessor, and after one sue a feigned and false action against the woman, and recovereth the house against her by default, so as the woman may have against him a *quod ei deforceat*, according to the statute of Westm. 2. now the reversion of the lessor is discontinued, so that he cannot have any action of waste. But in this case if the woman take husband, and he which recovereth let the house to the husband and his wife for term of their two lives, the wife is in her remitter by force of the first lease.

*Nota*, the statute of Westm. 2. cap. 4. doth give this writ of *quod ei deforceat* in this case, *cum temporibus retroactis aliquis amiserat terram suam per defaultam non habuit aliud recuperare quam per breve de recto quod eis competere non potuit qui de mero jure loqui non potuerunt veluti tenentes ad terminum vitæ, &c. provisum est quod de cætero non sit eorum defaulta ita prejudicialis quin statum suum si jus habeant recuperare possint per aliud breve quam per breve de recto, &c.* (1). And upon this case it is observed in *Plowd.* 157 *a*, that land is comprised in this word "reversion" of land; for if a man do recover the land against the tenant for life, this doth divest the reversion. And see 22 *E.* 4. 14 *a*, according to another point in this case; if my tenant for life [be] disseised, and after do re-enter, and by assise do recover, this re-continues the reversion as before. So it is where tenant for term of life doth bring a *quod ei deforceat* upon a recovery by default, and do recover, he shall restore the reversion as before. Of the word *deforceat*, *vide sect.* 614, *Deforseur* (*defortiator*) cometh of the French word *forceur*, *expugnator*. *Vide plus in Dr. Cowell's Interp. verbo Deforsour.*

(1) This quotation does not precisely follow the words of the statute, but the sense is the same.—*Ed.*



§ 675. And if the husband and wife make waste, the first lessor shall have a writ of waste against them, for that in as much as the wife is in her remitter, he is remitted to his reversion. But it seemeth in this case, if he that recovereth by the false action, will bring another writ of waste against the husband and his wife, the husband hath no other remedy against him, but to make default to the grand distress, &c. and cause the wife to be received, and to plead this matter against the second lessor, and shew how the action whereby he recovered was false and feigned in law, &c. so the wife may bar him.

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It appeareth in the precedent case, that by the false recovery had against the woman, tenant for life, the reversion of the lessor is thereby discontinued, so that during such discontinuance the lessor cannot have an action of waste, till that discontinuance be purged and avoided, as in that case by the remitter. And in this case, after that the wife is remitted, and thereby also he in the reversion is restored to his reversion, if he who did recover by the false action do bring a writ of waste against the husband and wife, the husband hath no remedy, but to make default at the great distress, and to cause his wife to be received according to the statute aforesaid, and to plead all that matter according to her case. And *nota*, it was said 22 E. 4. fo. 35 a, that in a writ of waste brought against the husband and his wife, the wife may be received, and so may not any other man, &c. *Vide sect. 668.*

§ 676. Also, if the husband discontinue the land of his wife, and after taketh back an estate to him and to his wife, and to a third person for term of their lives, or in fee, this is no remitter to the wife, but as to the moiety; and for the other moiety she must after the death of her husband sue a writ of *cui in vita*.

*Vide 44 Ass. pl. 2, and 44 E. 3. fo. 17 a*, adjudged, that the wife in this case is remitted to all, and by consequence that the third person hath not the moiety; and so it is adjudged in *Fitz. tit. Remitter*, 10. But *Brooke, tit. Remitter*, 6, abridging the same case, saith, *quod nota tamen miror*, for Littleton in his book saith, that

she is remitted but to moiety. But the law is according to Littleton (1). *Vide sect. 291.*

§ 677. Also, if the husband discontinue the land of his wife, and goeth beyond sea, and the discontinuee let the same land to the wife for term of her life, and deliver to her seisin: and after the husband cometh back, and agreeth to this livery of seisin, this is a remitter to the wife; and yet if the wife had been sole at the time of the lease made to her, this should not be to her a remitter. But in as much as she was covert baron at the time of the lease, and livery of seisin made unto her, albeit she taketh only the livery of seisin, this was a remitter to her, because a *fēme covert* shall be adjudged as an infant within age in such a case, &c. *Quære* in this case if the husband when he comes back will disagree to the lease and livery of seisin made to his wife in his absence, if this shall oust his wife of her remitter or not, &c.

After marriage the covenant doth continue during their several lives; for if the husband do enter into religion, yet she shall not recover dower, though in a sort matrimony is dissolved, and she is in a manner a widow; for she may have an action in her own name. 14 H. 8. 17 a. And according to the reason in this section, is that verse, *cælum non animum mutat qui trans mare currit*. And see the case of *Lady Belknap*, in 2 H. 4. 7, whereupon Judge Markham said, *ecce modo mirum, quod fœmina fert breve regis, non nominando virum conjunctim robore legis*.

And by this case may be observed, that a *fēme covert* is not to all purposes so disabled in law, but that a feoffment may be made to her and livery, and she may by an attorney take livery and seisin, &c. *Vide* 1 H. 7. 16 b, in *John Downe's case*, the opinion of Catesby and Brian.

(1) So Lord Coke says, "albeit there yet the law is taken as Littleton here is authority in our books to the contrary, holdeth it." Co. Lit. 356 b.—Ed.

But the will of the wife is subject unto the will of her husband, as appeareth by this case, upon a feoffment to a *fême covert*, she taketh nothing, unless her husband will agree thereunto (1).

And upon an obligation to enfeoff baron and feme, the refusal by the husband is a refusal by both; but where the husband and the wife be joint purchasers, the husband may make a feoffment and livery, although the wife be upon the land, and will not agree, and this shall be a discontinuance. *Finch, lib. 1. fo. 11 b.*

§ 678. Also, if the husband discontinue the lands of his wife, and the discontinuee is disseised, and after the disseisor letteth the same lands to the husband and wife for term of life, this is a remitter to the wife. But if the husband and his wife were of covin and consent that the disseisin should be made, then it is no remitter to his wife, because she is a disseissoress. But if the husband were of covin, and consent to the disseisin, and not the wife, then such lease made to the wife is a remitter, for that no default was in the wife.

Concerning covin, note the rule put in 3 Co. 78 a, *quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur*: where you may read many excellent cases to prove the same: and to the same purpose note in 5 Co. 80 a, *Fitzherbert's case*, and in *Plowden, fo. 51 and 55 a.* And yet in this section Littleton doth conclude, that if the husband be of covin, and consent to the disseisin, but not the wife, then such a lease made to her is a remitter, because no default was in the wife, which *nota*; for so is the law, and yet it was the opinion of six justices in 19 H. 8. 12 b, that if a disseisor do enter by covin to the intent to enfeoff an

(1) The Commentator seems to say that the disagreement of the husband shall oust the wife of her reverter: but Lord Coke says, "It seemeth that the disagreement shall not devest the remitter. First, because the state made to the wife, which wrought the remitter, is banished, and wholly defeated, and therefore no disagreement of the husband can devest the state gained by the lease, which by

the remitter was devested before. Secondly, for that the law having once restored her ancient and better right, will not suffer the disagreement of the husband to devest it out of her, and to revive the discontinuance, and revest the wrongful estate in the discontinuee. Thirdly, for that remitters tending to the advancement of ancient rights, are favored in law." Co. Lit. 356 b.—Ed.

infant, although the infant were not of covin, &c. yet he shall not be remitted, because he who is in by him who made the covin, shall be in the same plight as he who did the covinous act.

§ 679. Also, if such discontinuee make an estate of freehold to the husband and wife by deed indented upon condition, *scil.* reserving to the discontinuee a certain rent, and for default of payment a re-entry, and for that the rent is behind, the discontinuee enter: then for this entry the wife shall have an assise of *novel disseisin*, after the death of her husband, against the discontinuee, because the condition was altogether taken away, in as much as the wife was in her remitter; yet the husband with his wife cannot have an assise, because the husband is estopped, &c.

§ 680. Also, if the husband discontinue the tenements of his wife, and take back an estate to him for life, the remainder after his decease to his wife for term of her life; in this case this is no remitter to the wife during the life of the husband, for that during the life of the husband, the wife hath nothing in the freehold. But if in this case the wife surviveth the husband, this is a remitter to the wife, because a freehold in law is cast upon her against her will. And in as much as she cannot have an action against any other person, and against herself she cannot have any action, therefore she is in her remitter. For in this case, although the wife doth not enter into the tenements, yet a stranger which hath cause to have an action, may sue his action against the wife for the same tenements, because she is tenant in law, albeit that she be not tenant in deed.

And see the reason of this case in *sect.* 661. And note, the operation of the law shall be equivalent to the wife as suit and execution shall be unto her; as if she had brought her action against a stranger, and had recovered and had execution. *Vide Plowd.* 543 b. *Brooke, Remitter in fine.* For the condition is quite gone, for as much as the wife was remitted.

§ 681. For tenant of freehold in deed is he who if he be disseised of the freehold, may have an assise; but tenant of freehold in law before his entry in deed, shall not have an assise. And if a man be seised of certain land, and hath issue a son who taketh wife, and the father dieth seised, and after the son dies before any entry made by him into the land, the wife of the son shall be endowed in the land, and yet he had no freehold in deed, but he had a fee and freehold in law. And so note, that a *præcipe quòd reddat* may as well be maintained against him that hath the freehold in law, as against him that hath the freehold in deed.

Pleas of land which demand frank-tenement in demesne, do not lie but only against a tenant of the frank-tenement, as before is taught; *sect.* 661; that is to say, *in fait*, or in law, *ut hic*. *Vide according sect.* 447. And therefore a release of all actions real is no plea, except he that doth plead it was tenant of the frank-tenement at the time of the release; for otherwise he that made the release had not any cause' of action against him. *See sect.* 495. *See Finch. fo.* 85 *a, b*. And of actual seisin and seisin of law, upon the construction of the statute 32 H. 8. cap. 2, of limitations, *see* 4 *Co.* 10 *a, b*. But note in divers cases, a diversity between a frank-tenement *in fait* and in law, as in this case doth appear: an assise doth lie upon a frank-tenement *in fait* after disseisin, but not for him only that had a frank-tenement in law.

But a wife is dowable of a possession in law, which her husband had as heir, as it is said in *sect.* 40. And yet the opinions of some have been, if a stranger do abate after the death of the father, and the son do not enter before his death, that in this possession in law the wife of the son shall not be endowed. *Wood. in* 1 *H.* 7. *fo.* 16 *et* 17 *a, b*. And so is the opinion in 21 *E.* 4. *fo.* 60 *a*. But the law is otherwise, and distinctly according as Littleton hath set it down, and hereby doth agree *Fineux, in* 4 *H.* 7. *fo.* 1 *a*, and *Perkins, fo.* 72 *a*. *Sect.* 637, *ibidem*. But in the conclusion of this section, and also in the end of the last section, Littleton saith, note that *præcipe quòd reddat* may be maintainable against him who hath a frank-tenement in law, as well as against him that hath a frank-tenement in fact.

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§ 682. Also, if tenant in tail hath issue two sons of full age, and he letteth the land tailed to the eldest son for term of his life, the remainder to the younger son for term of his life, and after the tenant in tail dieth; in this case the eldest son is not in his remitter, because he took an estate of his father. But if the eldest die without issue of his body, then this is a remitter to the younger brother, because he is heir in tail, and a freehold in law is escheated, and cast upon him by force of the remainder, and there is none against whom he may sue his action.

This case and the diversity therein is apparent. But observe, if the eldest son (as this case is) had had issue of his body, then such issue should have been remitted no more than his father was; because by such reprisal no estate of frank-tenement doth descend to him: and if that younger brother do enter according to his title to the remainder, he is tenant against whom such issue of his eldest brother might bring his writ of *formedon*.

§ 683. In the same manner it is where a man is disseised, and the disseisor dieth seised, and the tenements descend to his heir, and the heir of the disseisor make a lease to a man of the same tenements for term of life, the remainder to the disseisee for term of life, or in tail, or in fee, the tenant for life dieth, now this is a remitter to the disseisee, &c. *causâ quâ suprà*, &c.

And this remitter doth avoid the disseisin, and the descent unto the issue of the disseisor, *causâ quâ suprà*.

§ 684. Note, if tenant in tail enfeoff his son and another by his deed of the land entailed, in fee, and livery of seisin is made to the other according to the deed, and the son not knowing of this agreeth not to the feoffment, and after he which took the livery of seisin dieth, and the son doth not occupy the land, nor taketh any profit of the land during the life of the father, and after the father

dieth, now this is a remitter to the son, because the freehold is cast upon him by the survivor; and no default was in him, because he did never agree, &c. in the life of his father, and he hath none against whom he may sue a writ of *formedon*, &c.

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And here observe, that livery and seisin cannot be made to one in the name of himself and of another that is absent, whereby any estate of frank-tenement may pass unto him that is absent without a deed.(1). 5 Co. 95 a, and Bro. Estates, 81. But if a man make a deed of feoffment to twenty men, and do deliver the deed and livery of seisin unto one of them in the name of all, in the absence of the others, this is good unto all, *ratione* that it is made by deed; otherwise it is if a man do make a feoffment without deed, and make livery to one in the name of all, this shall not vest any thing in the others; because the feoffment is made without a deed, and the others were not present at the livery. *Ibidem*. And *nota*, in such case when the feoffment was made by deed, the tenancy doth remain in them all till disagreement, [and disagreement] by words in the county shall not divest the freehold out of them. 3 Co. 26 b.

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§ 685. For if a man be disseised of certain land, and the disseisor make a deed of feoffment whereby he enfeoffeth B. C. and D. and livery of seisin is made to B. and C. but D. was not at the livery of seisin, nor ever agreed to the feoffment, nor ever would take the profits, &c. and after B. and C. die, and D. survive them, and the disseisee bringeth his writ upon disseisin in the *per* against D. he shall shew all the matter, how he never agreed to the feoffment, and he shall discharge himself of damages, so as the demandant shall recover no damages against him, although he be tenant of the freehold of the land. And yet the statute of Gloucester, cap. 1, will that the disseisee shall recover damages in a writ of entry founded upon a disseisin against him which is found tenant. And this is a proof in the other case, that for as much as the issue in tail came to the freehold, and not by his act, nor by his agreement,

(1) See Co. Lit. 359 a.—Ed.

but after the death of his father, therefore this is a remitter to him, in as much as he cannot sue an action of *formedon* against any other person, &c.

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And concerning damages to be recovered in a writ of entry, see before, *sect.* 659. And observe this exposition of Littleton of the statute of Gloucester, cap. 1, which is grounded upon the intent of the makers of the statute, and upon good reason; and yet it seemeth to be against the text: but the intent of the makers of the act made him so say, and he took their intent to be so by reason; for reason will not that he should pay damages to the disseisee, where he had never assented to do the wrong to him, nor never did receive, nor had intent to receive any profit of his land. *Plowd.* 204 b, 205 a. And see *ibidem* divers other statutes expounded upon like reason.

§ 686. Also, if an abbot alien the land of his house to another in fee, and the alienee by his deed charge the land with a rent-charge in fee, and after the alienee enfeoffe the abbot with licence, to have and to hold to the abbot and to his successors for ever, and after the abbot die, and another is chosen and made abbot: in this case the abbot that is the successor, and his convent, are in their remitter, and shall hold the land discharged, because the same abbot cannot have an action, nor a writ of *entre sine assensu capituli*, of the same land against any other person.

§ 687. In the same manner it is where a bishop, or a dean, or other such persons, alien, &c. without assent, &c. and the alienee charge the land, &c. and after the bishop takes back an estate of the same land by licence, to him and his successors, and after the bishop dieth; his successor is in his remitter as in right of his church, and shall defeat the charge, &c. *causâ quâ suprâ.*

And observe, that at this day lands may not be granted to abbès, bishops, or other ecclesiastical houses, but by special licence of the king. See *sect.* 140. And hereof see the statute against alienations in mortmain. And the reason of the remitter in these cases is declared the same which is in other cases of remitter, *scilicet*, because



the successor could not have any action or writ of entry *sine assensu capituli* for the same land against no other person.

§ 688. Also, if a man sue a false action against tenant in tail, as if one will sue against him a writ of entry in the *post*, supposing by his writ that the tenant in tail had not his entry but by A. of B. who disseised the grandfather of the demandant, and this is false, and he recovereth against the tenant in tail by default, and sueth execution, and after the tenant in tail dieth, his issue may have a writ of *formedon* against him which recovereth; and if he will plead the recovery against the tenant in tail, the issue may say, that the said A. of B. did not disseise the grandfather of him which recovered, in manner as his writ suppose, and so he shall falsify his recovery. And admit this were true that the said A. of B. did disseise the grandfather of the demandant which recovered, and that after the disseisin, the demandant, or his father, or his grandfather, by a deed had released to the tenant in tail all the right which he had in the land, &c. and notwithstanding this he sueth a writ of entry in the *post* against the tenant in tail, in manner as is aforesaid, and the tenant in tail plead to him, that the said A. of B. did not disseise his grandfather, in such manner as his writ suppose; and upon this they are at issue, and the issue is found for the demandant, whereby he hath judgment to recover, and sueth execution; and after the tenant in tail dieth, his issue may have a writ of *formedon* against him that recovered; and if he will plead the recovery by the action tried against his father who was tenant in tail, then he may shew and plead the release made to his father, and so the action which was sued, faint in law.

§ 689. And it seemeth, that a faint action is as much to say in English a *feigned action*, that is to say, such an action as albeit the words of the writ be true, yet for certain causes he hath no cause nor title by the law to recover by the same action. And a false action is where the words of the writ be false. And in these two cases aforesaid, if the case were such, that after such recovery and execution thereupon done, the tenant in tail had disseised him that re-

covered, and thereof died seised, whereby the land descended to his issue, this is a remitter to the issue, and the issue is in by force of the tail: and for this cause I have put these two cases precedent, to inform thee (my son) that the issue in tail by force of a descent made unto him after a recovery and execution made against his ancestor, may be as well in his remitter, as he should be by the descent made to him after a discontinuance made by his ancestor of the entailed lands by feoffment in the country, or otherwise, &c.

§ 690. Also, in the cases aforesaid, if the case were such, that after the demandant have judgment to recover against the tenant in tail, and the same tenant in tail dieth before any execution had against him, whereby the tenements descend to his issue, and he who recovereth sueth a *scire facias* out of the judgment to have execution of the judgment against the issue in tail, the issue shall plead the matter as aforesaid; and so prove that the said recovery was false or faint in law, and so shall bar him to have execution of the judgment.

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These cases are abridged in *Bro. tit. Fauxifier de Recoverie*, 58, thus, if a man recover upon a faint or false title against tenant in tail, and hath execution, and the tenant in tail dieth, the issue shall have a *formedon*, and may falsify the recovery: but if the tenant in tail do [die] after judgment, and before execution, and the demandant do bring *scire facias* against the heir, he may falsify in the *scire facias*; and if the demandant do enter upon the heir, [he] may have an assise and falsify in the assise. *Memorandum*.—These cases are of recoveries had against tenant in tail by writ of entry in the *post*; but the student must know, that the tenant in tail hath power to cut off and dock the estate tail, and the remainder or reversion thereupon descending; and manner and form thereof you may see exemplified in 10 Co. 45 b, and in *Manxell's case*, in *Plowd.* 8 a. And there, *fo.* 11 a, the diversity is, when the issue in tail may falsify recovery, and when not, and in 10 Co. 38 a. • *Vide in Manxell's case*, 14 a.

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§ 691. Also, if tenant in tail discontinue the tail, and dieth, and his issue bringeth his writ of *formedon* against the discontinuee (being tenant of the freehold of the land), and the discontinuee

plead that he is not tenant, but utterly disclaimeth from the tenancy in the land; in this case the judgment shall be, that the tenant goeth without day, and after such judgment the issue in the tail that is demandant may enter into the land, notwithstanding the discontinuance, and by such entry he shall be adjudged in his remitter. And the reason is, for that if any man sue *præcipe quòd reddat* against any tenant of the freehold, in which action the demandant shall not recover damages, and the tenant pleads non-tenure, or otherwise disclaim in the tenancy, the demandant cannot aver his writ, and say that he is tenant, as the writ supposeth. And for this cause the demandant, after that, that judgment is given that the tenant shall go without day, may enter into the tenements demanded, the which shall be as great an advantage to him in the law, as if he had judgment to recover against the tenant, and by such entry he is in his remitter by force of the entail. But where the demandant shall recover damages against the tenant, there the demandant may aver, that he is tenant as the writ supposeth, and that for the advantage of the demandant to recover his damages, or otherwise he shall not recover his damages, which are or were given to him by the law.

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And in what real actions damages are recoverable with the land, and in what not, at the common law, and in what actions by statute law, damages are recoverable at this day, together with the land in real action, see *sect. 659*. And *nota*, that the demandant in a *formedon* cannot maintain his writ against non-tenure or disclaimer. *Vide Thelool, 241 a.* *Vide in 8 Co. 162 a*, that the tenant after disclaimer shall not have a writ of error, *nota*. And in the conclusion of this section Littleton saith, that in case of disclaimer and judgment given, that the tenant shall go without day, the demandant may enter, &c. and shall be remitted, because in that writ he shall not recover damages; and see *40 E. 3. 27 b*, the rule is, *home ne disclaimera en nul action de terre, &c. mais lou le demaundant poit recover le terre.*

§ 692. Also, if a man be disseised, and the disseisor die, his heir being in by descent, now the entry of the disseisee is taken away;

and if the disseisee bring his writ of entry *sur disseisin* in the *per* against the heir, and the heir disclaim in the tenancy, &c. the demandant may aver his writ that he is tenant as the writ suppose, if he will, to recover his damages; but yet if he will relinquish the averment, &c. he may lawfully enter into the land because of the disclaimer, notwithstanding that his entry before was taken away. And this was adjudged before my master Sir R. Danby, late Chief Justice of the Common Pleas, and his companions, &c.

But in cases when the demandant may recover damages, and the land, if the tenant do disclaim in the tenements, in such cases the complainant may aver and maintain his writ, if he will; and therefore as unto these cases in this section, it is provided by the statute of Gloucester, cap. 1, that the disseisee shall recover damages in a writ of entry grounded upon a disseisin against him that is found tenant after the disseisor. And Littleton here saith, that the demandant may, if he will, relinquish the averment and his damages. And according to that see in 5 Co. 59 a, in *Foster's case*. The plaintiff in a *quare impedit* could not recover damages before the statute of Westm. 2. cap. 5, and the plaintiff may after the said statute take the judgment, which was at the common law, and relinquish the benefit of the statute, if he will, *quod fuit concessum per curiam*, wherewith doth agree the ancient rule, *quilibet potest renunciare juri pro se introducto*. 10 Co. 101 a. See in *Dyer*, 98 a, the stile of the queen, and thereupon the words of the statute made 1 & 2 Philip & Mary, cap. 8. fo. 25 b: and see in *Fox's Monuments*, vol. ii. 117, by Mr. Hales.

§ 693. Also, where the entry of a man is congeable, although that he takes an estate to him when he is of full age for term of life, or in tail, or in fee, this is a remitter to him, if such taking of the estate be not by deed indented, or by matter of record, which shall conclude or estop him. For if a man be disseised, and takes back an estate from the disseisor without deed, or by deed-poll, this is a remitter to the disseisee, &c.

§ 694. Also, if a man let land for term of life to another, who alieneth to another in fee, and the alienee makes an estate to the

lessor, this is a remitter to the lessor, because his entry was congeable, &c.

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*Nota*, when the entry of a man is lawful, in such cases if estate in the land is made unto him, he shall be remitted although he were of full age when he did take such an estate. *Vide Bro. tit. Remitter*, 51. See in 40 E. 3. 43 b, by *Witchingham*, accordant; and observe the force of a deed indented, and matter of record; for the nature of all estoppels is to stop a man from saying the truth. See *sect. 58*. And nevertheless it is adjudged, that if a man make a lease for years of his own land by deed indented, this is no conclusion or estoppel, but only during the term. 4 Co. 54 a, 53 b. And *nota* 6 Co. 15 a, in some cases although a lease be made by deed indented, yet it shall be no conclusion.

§ 695. Also, if a man be disseised, and the disseisor let the land to the disseisee by deed-poll, or without deed for term of years, by which the disseisee entereth, this entry is a remitter to the disseisee. For in such case where the entry of a man is congeable, and a lease is made to him, albeit that he claimeth by words *in pais*, that he hath estate by force of such lease, or saith openly, that he claimeth nothing in the land but by force of such lease, yet this is a remitter to him; for that such disclaimer *in pais* is nothing to the purpose. But if he disclaim in court of record, that he hath no estate but by force of such lease, and not otherwise, then is he concluded, &c.

And see in *Finch's book*, fo. 16 a, when two titles do concur, the best is preferred; as if a disseisor do lease the land to the disseisee for years, or at will, now if he enter, the law shall say that he is in of his ancient and better title. And observe well the diversity between agreement or disagreement in the country, and agreement or disagreement in court of record, concerning the frank-tenement of lands, *ut et hoc*, in 3 Co. 26 b, *et seq.* and see *sect. 693*.

§ 696. Also, if two joint-tenants seised of certain tenements in fee, the one being of full age, the other within age, be disseised, &c.

and the disseisor die seised, and his issue enter, the one of the joint-tenants being then within age, and after that he cometh to full age, the heir of the disseisor letteth the tenements to the same joint-tenants for term of their two lives, this is a remitter (as to the moiety) to him that was within age, because he is seised of the moiety which belongeth to him in fee, for that his entry was congeable. But the other joint-tenant hath in the other moiety but an estate for term of his life by force of the lease, because his entry was taken away, &c.

And observe, the first jointure is broken by this operation of law, because one is in of an estate of fee simple by remitter, according to his title; because he, being within age at the time of the descent, may enter; but the other joint-tenant by his acceptance, being then of full age, is in but only of such estate as was limited for life. See *sect. 662*, a special case, where land did descend to two sisters, yet they are not parceners, but tenants in common, because they are in by several titles. *Et vide sect. 663*.

### LIB. III. CAP. XIII.—WARRANTY.

§ 697. It is commonly said, that there be three warranties, (*scil.*) warranty lineal, warranty collateral, and warranty that commences by disseisin. And it is to be understood, that before the statute of Gloucester, all warranties which descended to them which are heirs to those who made the warranties, were bars to the same heirs to demand any lands or tenements against the warranties, except the warranties which commence by disseisin; for such warranty was no bar to the heir, for that the warranty commenced by wrong, viz. by disseisin.

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See Coke to the reader, before his 10th book, *fo. 5 b*, where it is said concerning warranties, that it is a cunning kind of learning, and very necessary for the purchaser; for it armeth him not only with sword by voucher to get the victory of recompence by recovery in value; but with a shield to defend a man's freehold and inheritance, by way of rebutter, (of rebutter, *vide 3 Co. 62 a, b.*) which title in

the law in my opinion (saith he) is excellently curious and curiously excellent.

And it is said in our book (and true it is) that warranties are much favored in law, because they do extend to establish him that is tenant in possession. 5 Co. 81 a. *And nota in 45 Ass. pl. 8 b*, a warranty descended to the king, and did bar him to demand a manor, which case see in *Plowd. 234 a*, 553 b, and 554; and 7 Co. fo. 11 a.

And in 8 Co. 51 b, it is resolved by the court, that a warranty is entire, and doth extend to all the land, and is a bar to every person upon whom it doth descend of all the right which they have in the land; and if they have right jointly or severally, every one is barred; and if one only hath right, and the other nothing, he who hath the sole right shall be barred of all.

This law of warranty is by a maxim of the law of England, and this maxim is taken to be of as strong effect in the law, as if it were ordered by Parliament to be a bar. *Doct. & Stud. li. 2. cap. 49*.

There are three warranties; 1. Warranty lineal. 2. Warranty collateral. 3. Warranty which doth commence by disseisin. At the common law, before the statute of Gloucester, cap. 3, all warranties which did descend to them, who be heirs unto them who did make the warranties, were bars to those heirs to demand any land or tenement contrary to their warranties, except warranties which commence by disseisin. But some have demanded upon what reasonable cause this maxim can have a lawful beginning; for what reason is it that the warranty of an ancestor, who hath no right to the land, should bar him who hath right thereunto: for answer unto which objection, and for the student's satisfaction herein, I refer him to *Doct. & Stud. li. 2. cap. 49*, and to *Plowd. fo. 306 a*.

Nevertheless, in process of time the stat. of Gloucester, c. 3, here mentioned, was made in the 6th year of E. 1, to remedy a great inconvenience in this behalf; for the heirs were subjected to be disinherited at the will of their prodigal and unnatural fathers; for *rerum progressus offendunt multa, quæ in initio præcaveri, seu provideri non possunt*, as it is said, 6 Co. 40 b. Read the statute, for *optima statuti interpretatrix est (omnibus particulis ejusdem inspectis) ipsum statutum; et injustum est, nisi totâ lege inspectâ unâ aliquâ ejus particulâ propositâ judicare vel respondere. Vide 8 Co. 117 b*.

§ 698. Warranty that commences by disseisin is in this manner: as where there is father and son, and the son purchaseth land, &c. and

letteth the same land to his father for term of years, and the father by his deed thereof enfeoffeth another in fee, and binds him and his heirs to warranty, and the father dies, whereby the warranty descendeth to the son, this warranty shall not bar the son; for notwithstanding this warranty the son may well enter into the land, or have an assise against the alienee if he will, because the warranty commenced by disseisin; for when the father which had but an estate for term of years, made a feoffment in fee, this was a disseisin to the son of the freehold which then was in the son. In the same manner it is, if the son letteth to the father the land to hold at will, and after the father make a feoffment with warranty, &c. And as it is said of the father, so it may be said of every other ancestor, &c. In the same manner is it, if tenant by *elegit*, tenant by statute merchant, or tenant by statute staple, make a feoffment in fee with warranty, this shall not bar the heir which ought to have the land, because such warranties commence by disseisin.

This section is of warranty which doth commence by disseisin, which at the common law at this day are no bar to the heir; and the reason is, when the father, or other next ancestor, who had estate for term of years, did make a feoffment in fee, this was a disseisin to the son of his freehold. And so observe *aliter*, that though the lessee for years have but a chattel, yet by his feoffment a fee simple doth pass, and to that effect see in *Hengham, parva, fo. 99, aliquando contingit quod tenentes ad voluntatem vel ad terminum annorum feoffant alios de facto tamen de jure non possunt, et tamen per eorum feoffamentum acquiritur feoffatus liberum tenementum, &c.* And the words of the statute Westm. 2. cap. 25, in such case are, *transfertur liberum tenementum in feoffatum.* See the notes upon *Hengham*, 157.

Also, in this place is said, that the same law is, if the father be tenant by *elegit*, tenant by statute merchant; or tenant by statute staple; for it is necessary that all warranties made do descend to him, that is intended to be barred by such warranties, as next heir to him that made the warranty, otherwise by no ways it could bar the heir; therefore I think it not impertinent by the way to speak somewhat of them. *Elegit* is by statute Westm. 2. 13 E. 1. cap. 18.



*Cum debitum fuerit recuperatum, &c.* by which the creditor may extend the moiety of his debtor's lands, and this was the first law or statute which did subject land to execution of a judgment or recognizance, which is in nature of a judgment. 3 Co. 12 a. *Non fuit sic a principio.*

And afterwards by another statute, made 18 E. 3, *de mercatoribus*, for the more speedy means to recover the debt (which read at large): and in 27 E. 3. cap. 9, another like statute was made for the merchant of the staple, beginning thus: *Item*, to the intent of the contracts made within the staple shall be the better holden, and their payments readily made, we have ordained and established, &c.

There is also another statute to the effect aforesaid, made 23 H. 8. c. 8, intitled, "An act concerning before whom recognizances of debts shall be made, and the form of the obligations," (which read,) and this statute is for the benefit of all others; whereas all those others were for the merchants, and this is generally and ordinarily in use and practice, and is commonly called a statute, but is a recognizance in the nature of a statute staple.

§ 699. Also, if guardian in chivalry, or guardian in socage, make a feoffment in fee, or in fee tail, or for life, with warranty, &c. such warranties are not bars to the heirs to whom the lands shall be descended, because they commence by disseisin.

This is also a warranty commencing by disseisin, as the other; for the guardian in socage or in chivalry have but particular estates in the land by the creation of law, as lessee for years had in the former cases by the act and demise of the lessor; therefore in such cases *uno instante* the warranty and the disseisin do commence as Littleton said in 21 E. 4. 30 a.

§ 700. Also, if father and son purchase certain lands or tenements, to have and to hold to them jointly, &c. and after the father alien the whole to another, and bind him and his heirs to warranty, &c. and after the father dieth, this warranty shall not bar the son of the moiety that belongs to him of the said lands or tenements, be-

cause as to that moiety which belongs to the son, the warranty commences by disseisin, &c.

And in this section the father and the eldest son being joint-tenants in fee simple, when the father did sell all the land with warranty, this is a disseisin to the son for his moiety.

§ 701. Also, if A. of B. be seised of a mese, and F. of G. that no right hath to enter into the same mese, claiming the said mese, to hold to him and to his heirs, entereth into the said mese, but the same A. of B. is then continually abiding in the same mese: in this case the possession of the freehold shall be always adjudged in A. of B. and not in F. of G. because in such case where two be in one house, or other tenements, and the one claimeth by one title, and the other by another title, the law shall adjudge him in possession that hath right to have the possession of the same tenements. But if in the case aforesaid, the said F. of G. make a feoffment to certain barrators and extortioners in the country, to have maintenance from them of the said house, by a deed of feoffment with warranty, by force whereof the said A. of B. dare not abide in the house, but goeth out of the same, this warranty commenceth by disseisin, because such feoffment was the cause that the said A. of B. relinquished the possession of the same house.

This case is vouched in 8 Co. 37a. If A. de B. is seised of a house, and F. de G. who no right hath, do enter into that house, claiming the house to him and his heirs, but the said A. doth continually dwell in the said house, in this case the possession of the freehold shall be continually judged in A. And in *Finch's 1st book*, fo. 12a, it is said, when two be in a house, or in other tenements, and one claimeth by one title, and the other by another title, the law shall adjudge him in possession who hath title to have the possession thereof. Also, in the new book titled *The Country Justice of Peace*, fo. 186, this case is vouched, that to prove in some cases the law doth prefer the right to the possession before the right to the land: and *Perkins*, fo. 45a, when two men do come upon land

or tenements together, to claim the same land and tenements, and the one of them do claim by another title, the law doth adjudge the possession in him who hath right title to the possession; for if there be a disseisor of one aere of land, who dieth seised of the same acre in fee, and the heir of the disseisor and disseisee come upon the same land together to claim the same land, the law doth adjudge the possession in the heir of the disseisor; and not in the disseisee, although the disseisee *habet majus jus ad rem*, viz. *in jure* to have the land than the heir of the disseisor hath; but the disseisor hath *majus jus in re*, viz. *in possessione*, to have the land, than the disseisee hath. *See in Plowd. 233 b.*

The rest of this section is also recited in 8 Co. aforementioned, and affirmed with Littleton, that such a warranty made, doth commence by disseisin; for the law doth abhor all unlawful force and fraud. Concerning a common barrettor, and of the derivation of that word, and of this polypragmon divers men have written, as Crompton, in his Justice of Peace, fo. 84. and Lambert, in his Justice of Peace, fo. 440. and the new book, entitled the Country Justice of Peace, 31, all which are worth the reading: but besides them, and before them all, I prefer that which Coke hath thereof in his 8th book, fo. 37 a, b. Some of the civil law obtrude, that our common lawyers may be opposed to tell directly what *barataria* doth truly signify, and import, and whence it is derived. *Vide Dr. Cosin's Apology, 2d part, fo. 71.*

§ 702. Also, if a man which hath no right to enter into other tenements, enter into the same tenements, and incontinently make a feoffment thereof to others by his deed with warranty, and deliver to them seisin, this warranty commences by disseisin, because the disseisin and feoffment were made, as it were, at one time. And that this is law, you may see in a plea, M. 11 E. 3. in a writ of *formedon* in the reverter.

Littleton doth vouch Mich. 11 E. 3. in a writ of *formedon* in the reverter, for a proof of this case, *quære librum quia non possum reperire in libro meo* (1). But the law is as it is here set down;

(1) This is mistaken, says Lord Coke, and should be 31 E. 3. and so is the original. Co. Lit. 370 a.—Ed.

for he had no right to enter into the lands, and therefore he was a disseisor to his son, as appeareth sect. 279. And when he doth *ipso facto* presently thereof make a feoffment to others by his deed with warranty, and deliver him seisin, although the warranty do descend upon the disseisee, yet the warranty doth commence by disseisin; for it doth carry meat in its mouth (as the saying is.) Nevertheless the cause here alleged is, because the disseisin and the feoffment were made *quasi uno tempore*, this may be *causa una*; but not *unica*; for you may read, 19 H. 8. fo. 12b, that if my ancestor disseise me, to the intent to make a feoffment with warranty to bar me, although the feoffment and the warranty be made twenty months after the disseisin, yet the warranty shall commence by disseisin, and so the first intent shall make the act or feoffment to enure otherwise, than in words or in time it should: and this case is vouched and approved in many books. *Plowd.* 51. 3 Co. 78a. and 5 Co. 79b. For the law shall judge upon the whole act, and the disseisin and warranty shall be coupled together, according to the intent of the parties; and there in this case, and other like, the law shall adjudge the warranty to commence by disseisin, though it were made at several times (1).

§ 703. Warranty lineal is where a man seised of lands in fee, maketh a feoffment by his deed to another, and binds himself and his heirs to warranty, and hath issue and die, and the warranty descends to his issue, that is a lineal warranty. And the cause why this is called lineal warranty, is not because the warranty descendeth from the father to his heir; but the cause is, for that if no such deed with warranty had been made by the father, then the right of the tenements should descend to the heir, and the heir should convey the descent from his father, &c.

Warranty lineal, which doth descend to the heir of him that made the warranty, is a bar to the heir demanding fee simple land, as

(1) So Lord Coke observes "if the disseisin were made to the intent to make a feoffment with warranty, albeit the feoffment be long after this (as hath been said), it is a warranty that commenceth by disseisin." Co. Lit. 369 b.—Ed.

sect. 713: and though the same ancestor do not leave other lands to descend to the heir as assets, or in recompence, for the ancestor might lawfully alien and make a feoffment of his land, whereof he is seised in fee simple without the consent and against the will of his heir. *Vide Glanville, lib. 7. cap. 1. and 6 Co. fo. 17a.* and although upon his feoffment no warranty had been made; for the heir apparent hath no right thereto during the ancestor's life; and therefore he may in such case bar him from any action or other means to evict it from the feoffee: but if the land so aliened happen to be evicted against the alienee upon a title paramount, the heir in such case is not bound to render in value of his own land; but if the same ancestor do leave to descend to his heir other land, he may be compelled to render in value.

§ 704. For if there be father and son, and the son purchase lands in fee, and the father of this disseiseth his son, and alieneth to another in fee by his deed, and by the same deed bind him and his heirs to warrant the same tenements, &c. and the father dieth; now is the son barred to have the said tenements; for he cannot by any suit, nor by any other mean of law, have the same lands by cause of the said warranty. And this is a collateral warranty; and yet the warranty descendeth lineally from the father to the son.

§ 705. But because if no such deed with warranty had been made, the son in no manner could convey the title which he hath to the tenements from his father unto him, in as much as his father had no estate in right in the lands; wherefore such warranty is called collateral warranty, in as much as he that maketh the warranty is collateral to the title of the tenements: and this is as much as to say, as he to whom the warranty descendeth, could not convey to him the title which he hath in the tenements by him that made the warranty, in case that no such warranty were made.

*Contraria contrariis addita magis elucescunt;* but *quære* of the true reason in this principal case; for the father did disseise his son, and after did alien with warranty, and yet the author saith, this is a warranty collateral, and not a warranty that did commence by dis-

seisin: *see the book 19 II. 8. fo. 12b*: which may seem to be contrary to Littleton in this case, unless the diversity between these two cases be (1), for that in this case there appeareth no covin, or that the father had any purpose or intent, when he did wrongfully enter upon his son and heir, by making a feoffment afterwards by warranty to bar and disinherit his son and heir; but in the other case, 19 II. 8. it is expressed, that the disseisin [was] done with intent to make a feoffment with warranty, to bar his heir apparent, and therefore although that feoffment were subsequent many months after; yet, when the warranty shall afterwards descend, it shall be in judgment of law a warranty which did commence by disseisin, and consequently shall not bar the heir. And read more for your satisfaction in 5 Co. fo. 79. and *nota librum*; and *see sect. 702*. And *quære* if this case was put only to explain that which was immediately affirmed in the precedent section, and not to shew that indeed this is a collateral warranty of force to bind the heir, for that is contrary to himself: *sect. 702*.

§ 706. Also, if there be grandfather, father, and son, and the grandfather is disseised, in whose possession the father releaseth by his deed with warranty, &c. and dieth, and after the grandfather dieth; now the son is barred to have the tenements by the warranty of the father. And this is called a lineal warranty, because if no such warranty were, the son could not convey the right of the tenements to him, nor shew how he is heir to the grandfather but by means of the father.

In this case when the grandfather was seised in fee simple, and disseised, the son is barred by the lineal warranty of his father, though the father had nothing of the land at the time of the warranty made, for the reason herein declared: but if the disseisor be impleaded for the same land, by cause of any ancient title, he cannot, by voucher of the son, enforce him to warrant the land, and to render in value if this land be evicted; and though other lands do descend to him from his grandfather in fee simple, although the

(1) Lord Coke notices the diversity without expressing any doubt. Co. Lit. 371 a.—Ed.

son must convey his title by his father, yet he doth not make himself heir to the land of his father, but to his grandfather; for never shall a man render in value by force of the deed of his ancestor, unless the assets do descend to him from the said ancestor, who made the deed with warranty. 24 E. 3. 47a; which case is so abridged by *Fitz. Recovery in Value*, 14. *Bro. Execution*, 143.

§ 707. Also, if a man hath issue two sons and is disseised, and the eldest son release to the disseisor by his deed with warranty, &c. and dies without issue, and afterwards the father dieth, this is a lineal warranty to the younger son, because albeit the eldest son died in the life of the father, yet by possibility it might have been, that he might convey to him the title of the land by his elder brother, if no such warranty had been. For it might be, that after the death of the father the elder brother entered into the tenements and died without issue, and then the younger son shall convey to him the title by the elder son. But in this case if the younger son releaseth with warranty to the disseisor, and dieth without issue, this is a collateral warranty to the elder son, because that of such land as was the father's, the elder by no possibility can convey to him the title by means of the younger son.

If a man seised in fee simple have issue two sons, and is disseised, and the eldest son do release to the disseisor by his deed with warranty, and dieth without issue, and after the father dieth, this is a lineal warranty to the younger brother, for the possibility of the descent (*ut sequitur*). And yet in such case the youngest son shall not make his descent by his eldest brother. And if the father and the two sons be, the eldest is attainted of felony in the life of his father, and dieth, the father dieth, the younger son shall inherit as immediate heir to the father. But if grandfather, father, and son be, the grandfather is seised of land in fee simple, the father is attainted of felony and dieth, after whom the grandfather dieth, the son shall not inherit; for he must make his conveyance by his father, and by his attainder the blood is corrupted, and so the bridge is broken. It followeth in this section, if in such case the youngest son do release with warranty to the disseisor, and dieth without

issue, this is a collateral warranty to the eldest son, for the reasons alleged.

§ 708. Also, if tenant in tail hath issue three sons, and discontinue the tail in fee, and the middle son release by his deed to the discontinuee, and bind him and his heirs to warranty, &c. and after the tenant in tail dieth, and the middle son dieth without issue, now the eldest son is barred to have any recovery by writ of *formedon*, because the warranty of the middle brother is collateral to him, in as much as he can by no means convey to him by force of the tail any descent by the middle, and therefore this is a collateral warranty. But in this case if the eldest son die without issue, now the youngest brother may well have a writ of *formedon* in the descender, and shall recover the same land, because the warranty of the middle is lineal to the youngest son, for that it might be, that by possibility the middle might be seised by force of the tail after the death of his eldest brother, and then the youngest brother might convey his title of descent by the middle brother.

This case doth exemplify the difference between the force of a collateral warranty and the other warranty lineal; for you see, that by the release with warranty to the discontinuee of the middle brother, his eldest brother was barred of his inheritance in tail, which should have descended to him after the death of his father; but in the end of this case it is said, that if the eldest brother be dead also, as well as the middle brother, (who made the warranty), then that warranty as to the younger brother is but lineal, as by reason of the possibility of lineal descent as appeareth; and therefore by consequence he is not barred by that warranty, which his middle brother made of the entail land, though his eldest brother were barred of the same warranty; for it was a collateral warranty to his eldest brother, but to him it was but a lineal warranty.

§ 709. Also, if tenant in tail discontinue the tail, and hath issue and dieth, and the uncle of the issue release to the discontinuee with warranty, &c. and dieth without issue, this is a collateral warranty



to the issue in tail, because the warranty descendeth upon the issue, that cannot convey himself to the entail by means of his uncle.

And the same reason is, if the uncle to the tenant in tail do release to the discontinuee with warranty, and dieth also without issue, so that his warranty do descend to the issue of the tenant in tail, the issue is barred from any means to recover his birth-right of the entailed land, because it was collateral to his title.

§ 710. Also, if the tenant in tail hath issue two daughters and dieth, and the elder entereth into the whole, and thereof maketh a feoffment in fee with warranty, &c. and after the elder daughter dieth without issue; in this case the younger daughter is barred as to the one moiety, and as to the other moiety she is not barred. For as to the moiety which belongeth to the younger daughter, she is barred, because as to this part she cannot convey the descent by means of her elder sister, and therefore as to this moiety, this is a collateral warranty. But as to the other moiety, which belongeth to her elder sister, the warranty is no bar to the younger sister, because she may convey her descent as to that moiety which belongeth to her elder sister by the same elder sister, so as to this moiety which belongeth to the elder sister, the warranty is lineal to the younger sister.

This case of Littleton's is remembered in Finch's 2d book, cap. 3. *fo. 37 b.* thus, if tenant in tail have issue two daughters, and the eldest do enter into all, and thereof doth make a feoffment with warranty, this is a collateral warranty, and a bar to the youngest for her moiety; which doth prove that this special entry is not the entry of both; for then it should be a warranty which doth commence by disseisin, and so no bar; and this case also is put in 9 Co. 11 a. among others, to prove that in many cases an act subsequent doth declare the intention of a general act precedent; as if tenant in tail have two daughters, and dieth, the eldest entereth into all, and after thereof maketh a feoffment with warranty, this is a lineal warranty for one moiety, and collateral for the other; for

the feoffment subsequent doth declare the intention of the general entry, that it was only for herself; otherwise it should be a warranty which should commence by disseisin for the moiety.

§ 711. And note, that as to him that demandeth the fee simple by any of his ancestors, he shall be barred by warranty lineal which descendeth upon him, unless he be restrained by some statute.

Lineal warranty doth bar him who demandeth fee simple, although no assets do descend to him from the same ancestor, as you may see before, sect. 697.

§ 712. But he that demandeth fee tail by writ of *formedon in descender*, shall not be barred by lineal warranty, unless he hath assets by descent in fee simple by the same ancestor that made the warranty. But collateral warranty is a bar to him that demandeth fee, and also to him that demandeth fee tail, without any other descent of fee simple, except in cases which are restrained by the statutes, and in other cases for certain causes, as shall be said hereafter.

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But he who demandeth fee tail by writ of *formedon in descender*, shall not be barred by lineal warranty, unless he have assets by descent in fee simple by the same ancestor who made the feoffment: and so observe, that tenant in tail shall be barred by lineal warranty, and assets, and yet the words of the statute of Westm. 2. c. 1. by which estates tail were created, *Rex statuit quod voluntas donatoris de cætero observetur ita quod non habeant illi quibus tenementum sic fuit datum sub conditione potestatem alienandi tenementum sic datum, quo minus ad exitum illorum, quibus tenementum sic fuerit datum remaneat post eorum obitum, &c.* but by *Keilway*, 25 H. 7. fo. 79. vide 31 H. 3. 28b. and in 21 H. 7. 11a. it is thus, I have seen in ancient books of Edward the Second, that the opinions [of those] who were at the making of the statute of Westminster 2. was, that when tenant in tail doth leave recompence to his issue of lands in simple, that he shall have power to make alien-

ation of entailed lands, as he might have done by the common law before that statute of entail was made; and therefore a lineal warranty with assets hath been admitted for a good bar by the equity of the statute of Gloucester, cap. 3. which statute of Gloucester was made before the statute of entails, by which statute the tenant by the curtesy was restrained by his alienation, and warranty, to disinherit his heir; yet by the same statute he may alien the land, whereof he is tenant by the curtesy, with warranty, so that the tenant by the curtesy do leave so much in value to his heir in recompence, which the lawyers do call assets. 4 *Co. fo. 4b.* And *nota* 6 *Co. 47a*, if a man have twenty acres of land in tail in the county of Norfolk, and twenty acres of equal value in fee simple in twenty several counties, and do make a feoffment in fee of the lands in tail with warranty, and dieth, the issue in tail doth bring a *formedon* for the land in Norfolk, in this case the alleging of assets cannot bar, but in [one] county only; but the jurors are bound, under pain of attain, upon manifest evidence, to find the assets in all the several counties in which the feoffor had land in fee simple: and so in exchange of lands in several counties, and in other like cases. *Vide librum.* *Nota* 8 *Co. 52.* • And observe well, if tenant in tail do alien with warranty, and do leave assets to descend, this lineal warranty is a bar to the issue, by reason of the warranty and assets descended; but neither the warranty without the assets, neither the warranty and assets without judgment in *formedon*, shall bar the estate tail; for if the issue, without a judgment, do alien the assets, his issue shall recover the land in tail; but after judgment given, that he shall be barred in *formedon*, the issue in tail also shall be barred. 10 *Co. 38a.* But a collateral warranty is a bar to him that demandeth fee tail, without any other descent of fee simple. *Plowd. 306. Doct. & Stud. 153.*

§ 713. Also, if land be given to a man, and to the heirs of his body begotten, who taketh wife, and have issue a son between them, and the husband discontinues the tail in fee and dieth, and after the wife releaseth to the discontinuee in fee with warranty, &c. and dieth, and the warranty descends to the son, this is a collateral warranty.

The land being given to the husband only in tail, wherein the wife had nothing, her release made to the discontinuee, after the death

of her husband, is a collateral warranty to their issue after the death of his mother; therefore the issue is barred, though no assets do descend to him from his mother, *scilicet*, by the course of the common law. *See sect. 725, accordant.* But how the law is at this day in this case, see the stat. 11 *H. 7. cap. 20.* And note here once for all, that it is a maxim in the law, that no warranty shall bar any estate in possession, reversion, or remainder, which was not divested and put unto a right (*ul hic*); for he who hath the estate in him cannot be put to his action, entry, or claim; for he hath that which action, entry, or claim, may vest or give to him. 9 *Co. 106 a.* 10 *Co. 96 b, 97 a.* 5 *Co. 142.* 21 *H. 7. 11 a.*

§ 714. But if lands be given to the husband and wife, and to the heirs of their two bodies begotten, who have issue a son, and the husband discontinue the tail and dieth, and after the wife release with warranty and dieth, this warranty is but a lineal warranty to the son; for the son shall not be barred in this case to sue his writ of *formedon*, unless that he hath assets by descent in fee simple by his mother, because their issue in the writ of *formedon* ought to convey to him the right as heir to his father and mother of their two bodies begotten *per formam doni*; and so in this case the warranty of the father and the warranty of the mother are but lineal warranty to the heir, &c.

But when lands are given to a man and to his wife in tail, who have issue, and the husband do discontinue the tail, and dieth, and after the mother doth release to the discontinuée with warranty, [and] dieth also, the issue in tail is not barred by the descent of the warranty; because it is lineal, except assets do descend also to the issue in fee simple from his mother; and this is the equity of the statute of Gloucester, cap. 3. as is aforesaid. *Fitz. N. B. 212 D.* 3 *H. 6. 18.* 8 *H. 6. 24.* Note this reason alleged, viz. because their issue must of necessity convey to him the right, as heir to his father, and also to his mother, of their two bodies; and upon this reason, though in another case, *nota in Dyer, 332 b, and 351 b,* and to that effect it is in the 3 *Co. 41 a,* none can be procreated, but by a

father and mother, and he must have in him their two bloods, whereby he is made an heir; for none can be heir to another, unless he have in him both the blood of him, to whom he will make himself heir, as Aristotle *libro Topicorum parte quacunque integrante sublatâ tollitur totum quod verum est, si accipias partem integrantem pro parte necessariâ.*

§ 715. And note, that in every case where a man demandeth lands in fee tail by writ of *formedon*, if any of the issue in tail that hath possession, or that hath not possession, make a warranty, &c. if he which sueth the writ of *formedon* might by any possibility, by matter which might be *in fait*, convey to him, by him that made the warranty *per formam doni*, this is a lineal warranty, and not collateral.

This section is a rule concerning these two precedent sections, and other like, to know when a warranty lineal doth descend to the heir in tail, and not a collateral warranty. *Vide* the possibility as it is in this case, and therefore *deficiente uno non potest esse hæres.*

§ 716. Also, if a man hath issue three sons, and giveth land to the eldest son, to have and to hold to him and to the heirs of his body begotten, and for default of such issue, the remainder to the middle son, to him and to the heirs of his body begotten, and for default of such issue of the middle son, the remainder to the youngest son, and to the heirs of his body begotten; in this case, if the eldest discontinue the tail in fee, and bind him and his heirs to warranty, and dieth without issue, this is a collateral warranty to the middle son, and shall be a bar to demand the same land by force of the remainder; for that the remainder is his title, and his elder brother is collateral to this title, which commenceth by force of the remainder. In the same manner it is, if the middle son hath the same land by force of the remainder, because his eldest brother made no discontinuance, but died without issue of his body, and after the middle make a discontinuance with warranty, &c. and dieth

without issue, this is a collateral warranty to the youngest son. And also in this case, if any of the said sons be disseised, and the father that made the gift, &c. releaseth to the disseisor all his right with warranty, this is a collateral warranty to that son upon whom the warranty descendeth, *causâ quâ suprâ*.

§ 717. And so note, that where a man that is collateral to the title, and releaseth this with warranty, &c. this is a collateral warranty.

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Note, in this case the remainder is the title for every of the sons, and therefore every of them is collateral to the other, as to title, though lineal in blood; also in this case the release made by the father to the disseisor is collateral to all the issues; for they cannot convey the land as heir to him, but by way of remainder, which is a collateral title, for that see 19 E. 4. 10 a.

§ 718. Also, if a father giveth land to his eldest son, to have and to hold to him and to the heirs male of his body begotten, the remainder to the second son, &c. if the eldest son alieneth in fee with warranty, &c. and hath issue female, and dieth without issue male, this is no collateral warranty to the second son, for he shall not be barred of his action of *formedon* in the remainder, because the warranty descended to the daughter of the elder son, and not to the second son: for every warranty which descends, descendeth to him that is heir to him who made the warranty by the common law.

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This section doth declare the law in a point whereupon divers subsequent cases do depend, viz. that every warranty must descend only to him that is heir to him that made the warranty by the course of the common law; and according is 22 E. 4. 10 a, *Garranty in Fitz.* 166, and in this case the daughter of the eldest son is heir to him who made the warranty, *scil.* heir general. *Sect.* 735.

§ 719. Note, if land be given to a man, and to the heirs male of his body begotten, and for default of such issue, the remainder thereof to his heirs female of his body begotten, and after the donee in tail maketh a feoffment in fee with warranty accordingly, and hath issue a son and a daughter and dieth, this warranty is but a lineal warranty to the son to demand by a writ of *formedon* in the descender; and also it is but lineal to the daughter, to demand the same land by writ of *formedon* in the remainder, *unless (si non)* the brother dieth without issue male, because she claimeth as heir female of the body of her father engendered. But in this case, if her brother in his life release to the discontinuee, &c. with warranty, &c. and after dieth without issue, this is a collateral warranty to the daughter, because she cannot convey to her the right which she hath by force of the remainder by any means of descent by her brother, for that the brother is collateral to the title of his sister, and therefore his warranty is collateral, &c.

This first part of this case is of a lineal warranty made by the donee in tail, father to the issues; and therefore it is no bar to the issues in tail, male or female: but the conclusion is of a collateral warranty, made by the brother, and therefore it is a bar, because the brother was collateral to the title of his sister, who did claim by way of remainder. *Sect. 716, 717.*

§ 720. Also, I have heard say, that in the time of King Richard the Second, there was a Justice of the Common Pleas, dwelling in Kent, called Richel, who had issue divers sons, and his intent was, that his eldest son should have certain lands and tenements to him and to the heirs of his body begotten; and for default of issue, the remainder to the second son, &c. and so to the third son, &c. and because he would that none of his sons should alien, or make warranty to bar or hurt the others that should be in the remainder, &c. he causeth an indenture to be made to this effect, viz. that the lands and tenements were given to his eldest son upon such condition, that if the eldest son alien in fee, or in fee tail, &c. or if any of his sons

alien, &c. that then their estate should cease and be void, and that then the same lands and tenements immediately should remain to the second son, and to the heirs of his body begotten, *et sic ultra*, the remainder to his other sons, and livery of seisin was made accordingly.

The meaning of Richel, Justice, was in this case to make a perpetuity, and Thirning, Chief Justice of the Common Place, in the time of H. 4, in like manner, as it appeareth in 21 H. 6. 33, but they were void in law (1). *Nota 1 Co. fo. 84, in Corbett's case, et fo. 138. Chudley's case, 6 Co. 40, et seq. 9 Co. 128. 10 Co. 42 b*, in all which cases and divers more, judgment hath been given against those perpetuities; whereupon Coke, to the reader before his 10th book, saith, at whose solemn funeral I was present, and accompanied to the grave of oblivion, but mourned not, that the commonwealth rejoiced that fettered freeholds and inheritances were set at liberty, and manifold inconveniences to the head and all the members of the commonwealth thereby avoided.

§ 721. But it seemeth by reason that all such remainders in the form aforesaid are void and of no value, and that for three causes. One cause is, for that every remainder which beginneth by a deed, it behoveth that the remainder be in him to whom the remainder is entailed by force of the same deed, before the livery of seisin is made to him which shall have the freehold: for in such case the growing and the being of the remainder is by the livery of seisin to him that shall have the freehold, and such remainder was not to the second son at the time of the livery of seisin in the case aforesaid, &c.

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But see in *Brooke's Abridgment, tit. Done et Remainder, 37*, a gift unto W. N. in tail, the remainder to the right heirs of I. S., who is alive, it is a good remainder if I. S. do die in the life-time of W. N. (2) *per totam curiam, in Avowry, tit. Feoffments, in Fitz.*

(1) See Co. Lit. 377 b.—Ed.

(2) See Co. Lit. 378 a.—Ed.



99. And yet by Littleton, in this section, if the remainder be not in the grantee at the time of the delivery, it shall never be good after, *tamen*, this recovery doth depend in abeyance, till the ancestor die, and therefore good; and yet there was no heir in *esse* at the time of the livery: and Saunders, Justice, saith, in *Plowd.* 29 *b*, if a remainder be limited upon a contrariety, then it shall not be good, as in the case of Richel, in Littleton; for when he had made a feoffment, then it could not remain. But the other cause which Littleton doth allege, viz. because it did not vest at the time of the livery, which is no cause; for it sufficeth if the remainder do vest, either during the particular estate, or *eo instante*, when the particular estate doth end. 1 *Co.* 138. Yet see an opinion in *Plowd. contra legem*, 28 *a*.

§ 722. The second cause is, if the first son alien the tenements in fee, then is the freehold and the fee simple in the alienee, and in none other; and if the donor had any reversion, by such alienation, the reversion is discontinued; then how by any reason may it be, that such remainder shall commence his being and his growing immediately after such alienation made to a stranger, that hath by the same alienation a freehold and fee simple, &c.? And also, if such remainder should be good, then might he enter upon the alienee, where he had no manner of right before the alienation, which should be inconvenient.

§ 723. The third cause is, when the condition is such, that if the elder son alien, &c. that his estate shall cease or be void, &c. then after such alienation, &c. may the donor enter by force of such condition, as it seemeth; and so the donor or his heirs in such case ought sooner to have the land than the second son, that had not any right before such alienation; and so it seemeth that such remainders in the case aforesaid are void.

And according it is in 1 *Co.* 86 *a*, 87 *b*, when a man doth give lands to one in tail, with a remainder over, he cannot by the rules of the law determine his estate in tail, as unto one person, and dispose the same estate to another person. 8 *Co. fo.* 17 *a*, *b*, *ac*-

*cording*. And therefore they did agree the case in 29 II. 8. *fo.* 35, *Dyer*, that a man cannot devise in fee simple to one, and if he do not such an act that his estate shall cease, and that another shall have it in fee simple; for when he had disposed of the estate in fee unto one, he hath no power after in the same will to devise it to another.

§ 724. Also, at the common law, before the statute of Gloucester, if tenant by the curtesy had aliened in fee with warranty, after his decease this was a bar to the heir, as it appeareth by the words of the same statute: but it is remedied by the same statute, that the warranty of tenant by the curtesy shall be no bar to the heir, unless that he hath assets by descent by the tenant by the curtesy; for before the said statute, this was a collateral warranty to the heir, for that he could not convey any title of descent to the tenements by the tenant by the curtesy, but only by his mother, or other of his ancestors; and this is the cause why it was a collateral warranty..

What the common law was in this case of a warranty made by the tenant by the curtesy before the statute of Gloucester, see before sect. 697: and in 5 Co. 80 *a*, by force of which statute the collateral warranty without assets was a bar wholly to all by the common law; now it is only a proportional bar, having regard to the assets which do descend. 3 Co. 52. And how the said statute hath been taken and expounded since the making thereof, note these cases following, in *Keilway*:—

*Keilway*, 124 *b*. If tenant by the curtesy do alien with warranty, and hath an annuity, which is of the same value as the land yearly, the question was, if this annuity be an asset or not: also, in *Keilw.* 104 *b*, note, if tenant by the curtesy do alien the land, which he holdeth by the curtesy, with warranty, and he hath a seignory holden of him by homage and fealty *tantum*, and dieth, and his heir do bring an assise of *mort d'ancestor* of the seisin of his mother; now the tenant cannot bar the heir in this case, because no land is descended to him by his father, nor no other thing, but this homage and fealty, which cannot be valued. But the question is now, after that the tenant of the land dieth without heir, so that the tenancy is come to the heir, who is lord by the escheat, if in this case the

tenant who did lose in the assise of *mort d'ancestor* may have a *scire facias* according to the statute of Gloucester; and it was argued, that he shall not have a *scire facias*, because the statute doth give a *scire facias* where the land (1) [descends from the ancestor himself to the heir] &c. (2).

§ 725. But if a man inheritor taketh wife, who have issue a son between them, and the father dieth, and the son entereth into the land, and endow his mother, and after the mother alieneth that which she hath in dower, to another in fee with warranty accordant, and after dieth, and the warranty descendeth to the son, now the son shall be barred to demand the same land by cause of the said warranty; because that such collateral warranty of tenant in dower is not remedied by any statute. The same law is it, where tenant for life maketh an alienation with warranty, &c. and dieth, and the warranty descendeth to him which hath the reversion or the remainder, they shall be barred by such warranty.

§ 726. Also, in the case aforesaid, if it were so that when the tenant in dower aliened, &c. his heir was within age, and also at the time that the warranty descended upon him he was within age; in this case the heir may after enter upon the alienee, notwithstanding the warranty descended, &c. because no laches shall be adjudged in the heir within age, that he did not enter upon the alienee in the life of tenant in dower. But if the heir were within age at the time of the alienation, &c. and after he cometh to full age in the life of tenant in dower, and so being of full age he doth not enter upon the alienee in the life of tenant in dower, and after the tenant in dower dieth, &c. there peradventure the heir shall be barred by such warranty, because it shall be accounted his folly, that he being of full age did not enter in the life of tenant in dower, &c.

(1) The object of this case, as cited by the Commentator, is, to shew the effect of the warranty by the tenant by the curtesy: he therefore concludes his quotation in the middle of the case: though it will be seen on reference, that the ar-

gument noticed in the conclusion, was over-ruled.—Ed.

(2) The Commentary breaks off here, and takes no notice of the following sections.—Ed.

§ 727. But now by the statute made 11 H. 7. cap. 10. it is ordained, if any woman discontinue, alien, release, or confirm with warranty, any lands or tenements which she holdeth in dower for term of life, or in tail of the gift of her first husband, or of his ancestors, or of the gift of any other seised to the use of the first husband, or of his ancestors, that all such warranties, &c. shall be void; and that it shall be lawful for him which hath these lands or tenements, after the death of the same woman, to enter.

§ 728. Also, it is spoken in the end of the said statute of Gloucester, which speaketh of the alienation with warranty made by the tenant by the curtesy in this form. Also, in the same manner, the heir of the woman after the death of the father and mother shall not be barred of action, if he demandeth the heritage or the marriage of his mother by writ of entry, that his father aliened in his mother's time, whereof no fine is levied in the king's court; and so by force of the same statute, if the husband of the wife alien the heritage or marriage of his wife in fee with warranty, &c. by his deed in the country, it is clear law that this warranty shall not bar the heir, unless he hath assets by descent.

§ 729. But the doubt is, if the husband alien the heritage of his wife by fine levied in the king's court with warranty, &c. if this shall bar the heir without any descent in value. And as to this, I will here tell certain reasons, which I have heard said in this matter. I have heard my master, Sir Richard Newton, late Chief Justice of the Common Pleas, once say in the same court, that such warranty as the husband maketh by fine levied in the king's court shall bar the heir, albeit he hath nothing by descent, because the statute saith (whereof no fine is levied in the king's court); and so by his opinion this warranty by fine remaineth yet a collateral warranty, as it was at the common law, not remedied by the said statute, because the said statute excepteth alienations by fine with warranty.

§ 730. And some others have said, and yet do say the contrary, and this is their proof, that as by the same chapter of the said statute it is ordained, that the warranty of the tenant by the curtesy shall be no bar to the heir, unless that he hath assets by descent, &c.

although that the tenant by the curtesy levy a fine of the same tenements with warranty, &c. as strongly as he can, yet this warranty shall not bar the heir, unless that he hath assets by descent, &c. And I believe that this is law; and therefore they say, that it should be inconvenient to intend the statute in such manner as a man that hath nothing but in right of his wife might by fine levied by him of the same tenements which he hath but in right of his wife with warranty, &c. bar the heir of the same tenements without any descent of fee simple, &c. where the tenant by the curtesy cannot do this.

§ 731. But they have said, that the statute shall be intended after this manner, *scil.* where the statute saith, whereof no fine is levied in the king's court, that is to say, whereof no lawful fine is rightfully levied in the king's court: and that is, whereof no fine of the husband and his wife is levied in the king's court, for at the time of the making of the said statute, every estate of lands or tenements that any man or woman had, which should descend to his heir, was fee simple without condition, or upon certain conditions in deed or in law. And because that then such fine might rightfully be levied by the husband and his wife, and the heirs of the husband should warrant, &c. such warranty shall bar the heir, and so they say that this is the meaning of the statute, for if the husband and his wife should make a feoffment in fee by deed in the country, his heir after the decease of the husband and wife shall have a writ of entry *sur cui in vita*, &c. notwithstanding the warranty of the husband, then if no such exception were made in the statute of the fine levied, &c. then the heir should have the writ of entry, &c. notwithstanding the fine levied by the husband and his wife, because the words of the statute before the exception of the fine levied, &c. are general, viz. that the heir of the wife after the death of the father and mother is not barred of action, if he demand the heritage or the marriage of his mother by writ of entry, that his father aliened in the time of his mother, and so albeit the husband and wife aliened by fine, yet this is true, that the husband aliened in the time of the mother, and so it should be in that case of the statute, unless that such words were, viz. whereof no fine is levied in the king's court: and so they

say, that this is to be understood, whereof no fine by the husband and his wife is levied in the king's court, the which is lawfully levied in such case; for if the justices have knowledge, that a man that hath nothing but in the right of his wife, will levy a fine in his name only, they will not, neither ought they to take such fine to be levied by the husband alone without his wife, &c. *Ideo quare* of this matter, &c.

§ 732. Also, it is to be understood, that in these words, where the heir demands the heritage, or the marriage of his mother, this word (or) is a disjunctive, and is as much as to say, if the heir demand the heritage of his mother, viz. the tenements that his mother had in fee simple by descent or by purchase, or if the heir demand the marriage of his mother, that is to say, the tenements that were given to his mother in frank-marriage.

§ 733. Also, where it is contained in divers deeds these words in Latin, *Ego et hæredes mei warrantizabimus et imperpetuum defendemus*; it is to be seen what effect this word (*defendemus*) hath in such deeds; and it seemeth that it hath not the effect of warranty, nor comprehendeth in it the cause of warranty: for if it should be so, that it took the effect or cause of warranty, then it should be put into some fines levied in the king's court; and a man never saw that this word (*defendemus*) was in any fine, but only this word (*warrantizabimus*); by which it seemeth, that this word and verb (*warrantizo*) maketh the warranty, and is the cause of warranty, and no other word in our law.

§ 734. Also, if tenant in tail be seised of lands devisable by testament after the custom, &c. and the tenant in the tail alieneth the same tenements to his brother in fee, and hath issue, and dieth, and after his brother deviseth by his testament the same tenements to another in fee, and bindeth him and his heirs to warranty, &c. and dieth without issue; it seemeth that this warranty shall not bar the issue in the tail, if he will sue his writ of *formedon*, because that this warranty shall not descend to the issue in tail, in so much as the uncle of the issue was not bound to the same warranty in his life-time: neither could he warrant the tenements in his life, in so much as the devise could not take any execution or effect until after

his decease. And in so much as the uncle in his life was not held to warranty, such warranty may not descend from him to the issue in the tail, &c. for nothing can descend from the ancestor to his heir, unless the same were in the ancestor.

§ 735. Also, a warranty cannot go according to the nature of the tenements by the custom, &c. but only according to the form of the common law. For if the tenant in tail be seised of tenements in borough English, where the custom is that all the tenements within the same borough ought to descend to the youngest son, and he discontinueth the tail with warranty, &c. and hath issue two sons, and dieth seised of other lands or tenements in the same borough in fee simple to the value or more of the lands entailed, &c. yet the youngest son shall have a writ of *formedon* of the lands tailed, and shall not be barred by the warranty of his father, albeit assets descended to him in fee simple from his said father according to the custom, &c. because the warranty descendeth upon his elder brother who is in full life, and not upon the youngest. And in the same manner is it of collateral warranty made of such tenements, where the warranty descendeth upon the eldest son, &c. this shall not bar the younger son, &c.

§ 736. In the same manner is it of lands in the county of Kent, that are called gavelkind, which lands are dividable between the brothers, &c. according to the custom; if any such warranty be made by his ancestor, such warranty shall descend only to the heir which is heir at the common law, that is to say, to the elder brother, according to the consueance of the common law, and not to all the heirs that are heirs of such tenements according to the custom.

§ 737. Also, if tenant in tail hath issue two daughters by divers venters, and dieth, and the daughters enter, and a stranger disseiseth them of the same tenements, and one of them releaseth by her deed to the disseisor all her right, and bind her and her heirs to warranty, and die without issue: in this case the sister which surviveth may well enter, and oust the disseisor of all the tenements, because such warranty is no discontinuance nor collateral warranty to the sister that surviveth, for that they are of half blood, and the one cannot be heir to the other, according to the course of the

common law. But otherwise it is, where there be daughters of tenant in tail by one venter.

§ 738. Also, if tenant in tail letteth the lands to a man for term of life, the remainder to another in fee, and a collateral ancestor confirmeth the state of the tenant for life, and bindeth him and his heirs to warranty for term of the life of the tenant for life, and dieth, and the tenant in tail hath issue and dies; now the issue is barred to demand the tenements by writ of *formedon* during the life of tenant for life, because of the collateral warranty descended upon the issue in tail. But after the decease of the tenant for life, the issue shall have a writ of *formedon*, &c.

§ 739. And upon this I have heard a reason, that this case will prove another case, viz. if a man letteth his lands to another, to have and to hold to him and to his heirs for term of another's life, and the lessee dieth living *celuy a que vie*, &c. and a stranger entereth into the land that the heir of the lessee may put him out, &c. because in the case next aforesaid, in as much as a man may bind him and his heirs to warranty to tenant for life only, during the life of the tenant for life, and this warranty descendeth to the heir of him which made the warranty, the which warranty is no warranty of inheritance, but only for term of another's life: by the same reason where lands are let to a man, to have and to hold to him and his heirs for term of another's life, if the lessee die living *celuy a que vie*, his heirs shall have the lands, living *celuy a que vie*, &c. For they have said, that if a man grant an annuity to another, to have and to take to him and his heirs for term of another's life if the grantee die, &c. that after his death his heir shall have the annuity during the life of *celuy a que vie*, &c. *Quære de istâ materiâ.*

Thus in *Finch*, li. 2. cap. 3. fo. 40 a, in estates for another man's life, if the tenant die in the life of *cestui que vie*, he that doth first enter shall have the land during the term, who is said occupant; but if land be let to one and his heirs for term of another's life, then his heir shall have it, and shall put out the occupant. And in 10 Co. 98 a, it is agreed, that if a man demise land to one and to his heirs during the life of J. S., or if tenant for life do grant his estate to



one, and to his heirs, in this case the grantee or lessee hath estate of frank-tenement descendible, but no estate of inheritance; for he shall be punished in waste, and he in the reversion or the remainder may enter for a forfeiture; also, his heir shall not have his age; for in a manner he is but a special occupant; nor he shall not be, in respect of it, charged as an heir in an action of debt, nor the wife of the son in this case shall be endowed. *Vide in Plowd. 556 b.*

§ 740. But where such lease or grant is made to a man and to his heirs for term of years, in this case the heir of the lessee or the grantee shall not, after the death of the lessee or the grantee, have that which is so let or granted, because it is a chattel real, and chattels reals by the common law shall come to the executors of the grantee, or of the lessee, and not to the heir.

And that this is but a term for years in grants, the books are express in the point, in 10 Co. 87 *a*, where also it is noted, if a term be demised to one and to his heirs male of his body, his heirs shall not have it, but his executors; for a term which is but a chattel cannot be entailed, and such a devisee may well alien the term to whom he will; and so it was adjudged, Trin. 18 Eliz. in the King's Bench, in *Peacock's case*, and *anno* 21 Eliz. resolved by Anderson and Walmesly, being referred to them out of the Chancery, between Higgins and Mills. And observe, that which in the end of this case is taught, that chattels reals and personals by the common law shall come to the executors of the grantee, or of the lessee, and not to the heir: arrearages of rent incurred in the life of the ancestor do not appertain to the heir, but to the executors. *Vide* 8 Co. 118 *a*. And in 4 Co. 65 *a*, the rule is, that in case of a sole corporation, or body politic, whether it be created by the king's charter, or by prescription, and a bishop, parson, vicar, master of a hospital, &c. no chattel, either in action or possession, shall go in succession, but the executors of the bishop, parson, &c. shall have them, no more than the heir of a private man may have them, which regularly is true. But there are some limitations of these rules; for treasure and other valuable chattels are so necessary and accident to the crown, that in the king's case they shall go with the crown to the successor, and not to the king's executors, as it appeareth, 7 H. 4. 43 *a*, by Gascoigne, and the treasure of the king (being in the bond

of peace, the preserver of [the] honor, and safety of the realm, and sinews of war) it is in so high estimation in the law in respect of the necessity thereof, that the embezzling of treasure found, although it was never in the king's coffers, was treason. 11 Co. 91 *b. in fine, et seq.* And in 9 Co. 97 *a*, this case is put out of 5 E. 4. 3, the Duke of Norfolk had estate in tail in an office holden of the king *in capite*, and died, his heir within age, and this was found by office, in this case the king hath a chattel in the office, that is to say, during the minority of the heir, and if the king die, this shall descend to the next king, and shall not go to his executors or administrators. See in *Brooke, Ayde del Roy*, 28, *et in titulo Petition et Monstrance de droit*, 7, that chattels shall descend *in casu regis*; the king seiseth the temporalities of a bishop, and dieth, they shall not go to his executors. 7 II. 4. 41. If the king be entitled to present, and die, his executors shall not present. 7 E. 6. 26. *Bro. tit. Chattels, et quid sunt Chattels.*

Also, if the owner of a park or warren die, his heir shall have the deer or other game, &c. and not the executors or administrators; because without them the park or warren, which is an inheritance, is not complete; nor felony cannot be committed in them; but of things which be made tame, in which a man by his industry hath any property, felony may be committed. 7 Co. 17 *b*, *et* 18 *a*. If a man have a manor, on which he hath divers pools full of fishes, and maketh his executors, and dieth, the question is, if the heir shall have the fishes or his executors, and it was argued, that the executors shall have the fishes, because they be chattels, and do commence by the act of man, as the corn upon the land, which the executors shall have, and not the heir; and also by the opinion of some it is felony to take the fishes out of the pool, and if this be law, then it doth prove, that the fishes are merely chattels, in which case the executors shall have them. Also, if a man be disseised of a pool, he shall have an assise, and shall make his plaint of two or three acres according to his land, covered with water, and this doth prove that the fishes be not parcel of the freehold, in which case it is a chattel, and is not like unto trees, or unto a meadow; for the land naturally will bear them, and therefore the heir shall have them; but in a pool a man never shall have fishes without the act of a man, and so there is a diversity. But of the other part it was said, that the fishes of the pool are the profit of the pool, and other profits the land hath not, in which case they be annexed to the land, and in a manner is the freehold, as the vesture of any land is; for if a

man grant the vesture of his land for term of life, it is a grant of the land for term of life; because the vesture is the profit of the land, and all is one, to have the profit of the frank-tenement, and the frank-tenement itself: and so in the other place, because the fishes be the profits of the pool, the heir shall have them, and not the executors; for if a man have a park full of deer, and maketh his executors, and dieth, the heir shall have them, because the deer is the profit of the park, which the executors cannot have, and because the park, which is an inheritance, is not then complete without the deer. 7 Co. 17 b, *in fine*. And so it is if a man have a dove-house full of ancient pigeons, the heir shall have them, and not the executors. *Keilw.* 118 a. As by the grant of a reversion the charters and evidences do pass as things attending upon the inheritance, and in verity they are the sinews of the inheritance. 11 Co. 50 b. 74 b. *Vide sect. 101, in fine*. Read the case put by Wray, in *Plowd.* 323 b. Also in 4 Co. 64 a, it is resolved, that the wainscot, glasses, locks, and keys of a house, do belong to the heir, and not to the executors of the owner of the house.

The equipage and armour, competent to the person of a knight, was by the ancient law as inheritance descendible unto the heir, and not as moveables cast upon the executors; whereof see at large in *John Selden's Titles of Honor, part 2. fo. 332*, and the *Lady Whitsher's case*, 9 E. 4. 14 a, which case was adjudged, that the taking away of a knight's coat armour, and certain pennons, with certain arms of his, and a sword hanged up in a chapel, where he was buried, the action doth not lie for the executors, but for the heir, as defender of his father's honor; for *cui injuria, ei accruit jus. Ferne's Glory of Generosity*.

§ 741. Also, in some cases it may be, that albeit a collateral warranty be made in fee, &c. yet such a warranty may be defeated and taken away. As if tenant in tail discontinue the tail in fee, and the discontinuee is disseised, and the brother of the tenant in tail releaseth by his deed to the disseisor all his right, &c. with warranty in fee, and dieth without issue, and the tenant in tail hath issue and die; now the issue is barred of his action by force of the collateral warranty descended upon him. But if afterwards the discontinuee entereth upon the disseisor, then may the heir in tail have well his action of *formedon*, &c. because the warranty is taken away and de-

feated, for when a warranty is made to a man upon an estate which he then had, if the estate be defeated, the warranty is defeated.

When the estate to which a warranty is annexed, is defeated, [the warranty is also defeated]; *debile fundamentum fallit opus*, saith *Finch*, *li. 1. fo. 5 a*, where he doth thus rehearse this case of Littleton; for if tenant in tail discontinue, and the discontinuee is disseised, (or he do make a feoffment upon condition), in whose possession a collateral ancestor of the issue in tail doth release, and die, the entail is barred, and if the discontinuee do enter upon the disseisor, or the feoffee, for condition broken, the issue is restored to his *formedon*. And see 5 Co. 80 *a*, a warranty must always enure upon an estate. And 10 Co. 96 *b*, every warranty ought to be annexed, and knit unto an estate; for every warranty hath his essence by depending upon an estate; and therefore also when the estate of tenant in tail, to which a warranty is annexed, is determined by the death of the tenant in tail without issue, the warranty, which hath his essence by dependency, is also determined; for then there is no estate which can support it. *Vide librum more at large, sect. 738.*

§ 742. In the same manner it is, if the discontinuee make a feoffment in fee, reserving to him a certain rent, and for default of payment a re-entry, &c. and a collateral warranty of the ancestor is made to the feoffee that hath the estate upon condition, &c. and dieth without issue, albeit that this warranty shall descend upon the issue in tail; yet if after the rent be behind, and the discontinuee enter into the land, then shall the issue in tail have his recovery by writ of *formedon*, because the collateral warranty is defeated. And so if any such collateral warranty be pleaded against the issue in tail, in his action of *formedon*, he may show the matter as is aforesaid, how the warranty is defeated, &c. and so he may well maintain his action, &c.

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See 49 E. 3. 11, which is abridged in *Bro. Warranty*, 99, thus, assise, the tenant doth plead a feoffment with warranty of the grandfather of the plaintiff, to which the plaintiff saith, *quod tempore conceptionis*, &c. the grandfather had nothing but for term of life, the

remainder to W. N., which W. N. did enter for the alienation, because it was to his disinheritance, and so doth well confess and avoid the warranty, *et hoc concordat cum libro*, Littleton, that if a man may avoid or defeat the possession, upon which the warranty is made, it is a good avoidance of the warranty. 3 H. 7. 10 a, *accordant*. The case in reason is according to the last precedent case, *nihil tam conveniens est naturali æquitati quam unumquodque dissolvi eo ligamine quo ligatum est*. 2 Co. 53. 4 Co. 57. 5 Co. 26. 6 Co. 43.

§ 743. Also, if tenant in tail make a feoffment to his uncle, and after the uncle make a feoffment in fee with warranty, &c. to another, and after the feoffee of the uncle doth re-enfeoff again the uncle in fee, and after the uncle enfeoffeth a stranger in fee without warranty, and dieth without issue, and the tenant in tail dieth, if the issue in tail will bring his writ of *formedon* against the stranger that was the last feoffee, and that by the uncle, the issue shall not be barred by the warranty that was made by the uncle to the first feoffee of his uncle, for that the said warranty was defeated and taken away, because the uncle took back to him as great an estate from his first feoffee to whom the warranty was made, as the same feoffee had from him. And the cause why the warranty is defeated, is this, viz. that if the warranty should stand in his force, then the uncle should warrant to himself, which cannot be.

See 44 E. 3. 39. 2 H. 6. 29, and see sect. 57, that by the law a man cannot do an act to himself, and *frustra fit quod non perseverat*.

§ 744. But if the feoffee had made an estate to his uncle for term of life, or in tail, saving the reversion, &c. or a gift in tail to the uncle, or a lease for term of life, the remainder over, &c. in this case the warranty is not altogether taken away, but is put in suspense during the estate that the uncle hath. For after that, that the uncle is dead without issue, &c. then he in the reversion, or he in the remainder, shall bar the issue in tail in his writ of *formedon* by the collateral warranty in such case, &c. But otherwise it is where the uncle hath as great estate in the land of the feoffee to

whom the warranty was made, as the feoffee hath himself. *Causa patet.*

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Observe the diversity between extinguishment and suspension of a warranty by unity of possession, which doth appear in this, and in the next precedent section; and see this case abridged by *Brooke, title Warranty, 91.*

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§ 745. Also, if the uncle after such feoffment made with warranty, or a release made by him with warranty, be attaind of felony, or outlawed of felony, such collateral warranty shall not bar nor grieve the issue in the tail, for this, that by the attainder of felony, the blood is corrupted between them, &c.

See sect. 114, in which case if the father be attainted of felony or treason, his son is not his heir apparent, and by consequence the lord shall have the wardship of the son, though the father be living, if land descend to him from his mother. *3 Co. 38 a, in fine.* See *Stamford's Pleas of the Crown* for this corruption of blood. And for that cause in this case the issue in tail is not barred by the warranty of his uncle, because it cannot descend upon him, no more than the lord was barred in the former case.

§ 746. Also, if tenant in tail be disseised, and after make a release to the disseisor with warranty in fee, and after the tenant in tail is attaind, or outlawed of felony, and hath issue and dieth; in this case the issue in tail may enter upon the disseisor. And the cause is for this, that nothing maketh discontinuance in this case but the warranty, and warranty may not descend to the issue in tail, for this, that the blood is corrupt between him that made the warranty and the issue in tail.

Observe that tenant in tail doth not forfeit his land entailed for felony; for it hath always been taken after the statute *de donis conditionalibus* that the issue in tail should enjoy the land in case where his ancestor was attainted of felony. *Plowd. 237 b.* And the warranty doth not descend after his ancestor's death, who made the warranty, because of the corruption of blood.

§ 747. For the warranty always abideth at the common law, and the common law is such, that when a man is attaind or outlawed of felony, which outlawry is an attainder in law, that the blood between him and his son, and all others which shall be said his heirs, is corrupt, so that nothing by descent may descend to any that may be said his heir by the common law. And the wife of such a man that is so attaind, shall never be endowed of the tenements of her husband so attaind. And the cause is, for that men should more eschew to commit felonies. But the issue in tail as to the tenements tailed is not in such case barred, because he is inheritable by force of the statute, and not by the course of the common law: and therefore such attainder of his father or of his ancestor in the tail, shall not put him out of his right by force of the tail, &c.

But if grandfather, father, and son be, and the grandfather is tenant in tail, and the father is attaind of felony or treason, and dieth, and after the grandfather dieth seised, although the blood be corrupted, yet the land shall descend unto the son *per formam doni*. 8 Co. 166 a, in fine, *Digby's case*.

If the husband be attaind of felony by outlawry or otherwise, the wife shall lose her dower. *F. N. B.* 150 I. And so was the common law, and the reason was alleged in this case; and thereto agreeth Sir John Davies, in his book, 34 a; for when men know that their wives shall not be endowed, nor their issue inheritable to their lands, they will commit such crimes with less audacity, and for the affection to their wives and children, men will more eschew to commit any felony: and so we see that for the transgression of the father, God will punish the children, *usque ad tertiam et quartam generationem*, as it is in the decalogue; but that is in this world, *sed quoad animæ, filius non portabit iniquitatem patris*. *Plowd.* 414 a.

But whereas in the *Com.* 262 a, it is said, there are but three writs of escheat concerning attainder; first, for felony *pro quâ suspensus est*; secondly, *pro quâ abjuravit regnum*; thirdly, *pro quâ utlegatus est*. And although the husband be adhering, and aiding to the king's enemies, or be killed in open rebellion against the king, his wife shall not forfeit her dower in that case. 8 H. 3. 91. *Nota*, if a *femme* seised in fee is attaind of felony, and hath issue by her husband before, although she be hanged, yet the husband shall be

tenant by the curtesy. 21 E. 3. 49 *b*, and 11 H. 7. 19 *b*; otherwise the land whereof he is seised in right of his wife, is forfeited maintainant; but in this case the rule doth hold, *res inter alios acta alteri nocere non debet*. 6 Co. 41. And at this day the strictness of the common law in this case is taken away by the statute of the 1 E. 6. cap. 13, so that for felony committed by the husband, the wife shall not lose her dower.

§ 748. Also, if tenant in tail enfeoff his uncle, which enfeoffs another in fee with warranty, if after the feoffee by his deed release to his uncle all manner of warranty, or all manner of covenants real, or all manner of demands, by such release the warranty is extinct. And if the warranty in this case be pleaded against the heir in tail that bringeth his writ of *formedon*, to bar the heir of his action, if the heir have and plead the said release, &c. he shall defeat the plea in bar, &c. And many other cases and matters there be, whereby a man may defeat a warranty, &c.

In 5 Co. 70 *b*, a diversity is taken between a duty certain upon a condition subsequent, for this may be released before the day of performance of the condition, and duty uncertain at the first, and upon condition precedent to be made certain at a time after; [that] within the mean time is but a mere possibility, and therefore it cannot be released: yet in this case of Littleton, by reason of a [release of all] demands, a warranty, which is a covenant real, is extinct, though it be executory and uncertain: but *nota* the feoffee to whom the warranty is made, may have a *warrantia chartæ*, and bind the land *pro loco et tempore*: and though it be adjudged by a release of all actions, evicts, and quarrels, a covenant, before the breach of it, is not released, because then there was no cause of action or any certain duty before the breach; but the breach must precede the action, and the cause of the duty; and therefore such a release shall be no bar; yet by release of covenants, the covenant is discharged before the breach of it, which also is proved by this case of Littleton. *Vide sect. 513*.

The opinion of Coke, Attorney-General, is in 1 Co. 112, *Albanie's case b*, that a future power may be released; for it may be resembled to a condition subsequent, although the performance, or breach of it, cannot be made without an act precedent, and although it cannot be performed but upon a contingency, yet it is an inheritance in him,



which shall descend to his heir, and therefore may be released, and his heir by his release may be barred. And therefore if a man do make a feoffment in fee with warranty, in this case before that he can vouch, it behoveth that he be impleaded, so that the voucher doth depend upon an act uncertain, that is to say, that he shall be impleaded in a real action by a stranger; and that yet by a release of all demands, Littleton saith, that a warranty is extinct; for it is an inheritance in law, and may descend to the heir, and by consequence may be released. *Vide 8 Co. 151. Vide Lampet's case, in 10 Co. 52.* *Nota*, in this case as in others, he that will have benefit and advantage of a release made unto another, must shew it forth, and it is not enough that he can prove by testimony of witness upon oath, that the release was made. *See sect. 452, 453.* Concerning the force and extent of this word "demand" in release, *see sect. 508. 509. 500.*

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§ 749. And it is to be understood, that in the same manner as the collateral warranty may be defeated by matter in deed or in law; in the same manner may a lineal warranty be defeated, &c. For if the heir in tail bringeth a writ of *formedon*, and a lineal warranty of his ancestor inheritable by force of the tail, be pleaded against him, with this, that assets descended to him of fee simple, which he hath by the same ancestor that made the warranty; if the heir that is demandant may annul and defeat the warranty, that sufficeth him: for the descent of other tenements of fee simple making nothing to bar the heir without the warranty, &c.

Now I have made to thee, my son, three books.

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In the last and in other precedent cases it is sufficiently declared, that there are divers cases and matters by which a man may defeat collateral warranty; and in this present section Littleton doth conclude that the same law is in cases of lineal warranty; for *ubi eadem est ratio eadem est lex*.

But *nota* in many cases, a man shall be bound and barred of his right by a warranty, who cannot by any means avoid it. *1 Co. 67 a.*

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